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# Judges of the High Court

## Jan.—June, 1918

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THE

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## PRIVY COUNCIL.

PRESENT:—LORD DUNEDIN, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

ussumat Gunjeshwar Kunwar ... *Appellant**

*v.*

Durga Prashad Singh and others ... *Respondents.*

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Mussumat Gunjeshwar Kunwar *v.* Durga Prasad Singh.

*Hindu Law—Permanent blindness after birth—Exclusion from a share of the family property.*

Under Hindu Law blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance.

The rule laid down in Rajkumar Sarbadhikari's Hindu Law of Inheritance, p 956, adopted by the Board.

*Mohesh Chunder Roy* v. *Chunder Mohun Roy* [1] *and Murarji Gokuldas* v. *Parvatibai* [2], approved.

Appeal from a decree of the High Court at Calcutta (Woodroffe and Richardson, JJ.), reversing a decree of the Officiating Subordinate Judge of Bankipur, who decreed the plaintiff-appellant's suit in part.

The facts of the case are fully stated in their Lordships' judgment.

*B. Dube* for Appellant:—The evidence establishes that Bishambhar was not born blind. He was therefore entitled to his share of the family property, and Durga had no honest and *bona fide* belief in his claim in the suit of 1904 in which the compromise in question was made. The Court should not enforce that compromise but give the plaintiff the relief prayed for: *Dunnage* v.

* 7, 8, 11, 12, 14th June and 6th July 1917.

1. (1874) 14 Ben. L R. 273. 2. (1876) I. L. R. 1 B. 177.

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*White* [1]. He also relied on *Imrit Kunwar* v. *Roop Narain Singh* [2]. (*De Gruyther, K. C.*, remarked that the Board did not approve of that case in *Khunni Lal* v. *Gobind Krishna Narain* [3].)

The onus is on the respondent Durga to show that the compromise was explained to the plaintiff's mother who was a Purdanashin lady, and that she understood it. The respondent has not discharged that onus. Moreover, the plaintiff's mother had no independent advice. It is therefore submitted that the compromise is not binding on the plaintiff: *Ashgar Ali* v. *Delroos Banco Begum* [4], *Sudisht Lal* v. *Mussumat Sheobarat Kunwar* [5], and *Bibee Rukhun* v. *Shaikh Ahmed Hossein* [6].

As to the compromise of the partition suit of 1900 and the decree made in pursuance thereof, the Court had all the materials before it and consequently they are binding on the respondent: *Manohar Lal* v. *Jadu Nath Singh* [7].

*De Gruyther K.C.*, and *J. M, Parikh* for the Respondents:—The evidence establishes that Bishambhar was born blind. He was therefore not entitled to inherit. The test to apply here is whether Durga had an honest and *bona fide* belief in his claim made in 1904. As to what is an honest and *bona fide* belief reference was made to *Miles* v. *New Zealand Alford Estate Company* [8]. Durga could have no personal knowledge of the fact whether his elder brother was or was not born blind, and the evidence shows that Durga had reasonable ground for an honest belief that his brother was born blind. There is nothing on record to suggest that Durga believed that his brother was not born blind. It is therefore submitted that the compromise is binding. They submitted on the evidence that the plaintiff's mother knew what she was doing.

Assuming that Bishambhar was not born blind, it is submitted that inasmuch as he became permanently and incurably blind long before 1900 he was not then entitled to partition the joint property: Mitakshara, Ch. III Sec. 10 paras. 1, 2, 3, 4, 5, 6, 7, and 9. There is no decided case on this point. The only point decided is that in order to exclude a co-parcener from inheritance he must have been born blind, *Murarji Gokuldas* v. *Parvatibai* [9].

1. (1818) 1 Swanston's Reports in Chancery, p. 137.
2. (1880) 6 Cal. L. R. 76.
3. (1911) L. R. 38 I. A. 88.
4. (1877) I. L. R. 3 Cal. 324;
5. (1881) L. R. 8 I. A. 39: I. L. R. 7 C. 245.
6. (1874) 22 W. R. 443.
7. (1906) L. R. 33 I. A. 128.
8. (1882) 32 Ch. D. 266 at pp 283 and 284.
9. (1876) I. L. R 1 B. 177.

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Mussumat Gunjeshwar Kunwar. v. Durga Prashad Singh.

As to the form of the decree where a compromise with a minor is set aside at the minor's instance, reference was made to *Manohar Lal* v. *Jadu Nath Singh* [1]. Reference was also made to *Lala Muddun Gopal* v. *Mussumat Khikhinda Koer* [2].

*Dube* replied.

The Judgment of their Lordships was delivered (July 6, 1917) by

Sir John Edge.

*Sir John Edge*:—This is an appeal from a decree, dated the 7th May, 1912, of the High Court at Calcutta which reversed a decree, dated the 31st March, 1908. of the Officiating Subordinate Judge of Bankipur and dismissed the suit. The plaintiff who is the appellant here is a minor and is suing by her next friend. The defendants are Durga Prashad Singh, an uncle of the plaintiff, Mussummat Harbans Kunwar, her mother, and three assignees of the defendant Durga Prashad Singh.

The suit was brought on the 21st July, 1906, to obtain a declaration that a compromise which was entered into between Durga Prashad Singh, who is the first defendant in this suit, and Mussummat Harbans Kunwar, and a decree dated the 30th August, 1904, which was made in pursuance of that compromise, are not binding upon the plaintiff; a declaration that the plaintiff's father, Bishambhar Prashad Singh, was at the time of his death separate from his brother, the defendant, Durga Prashad Singh; a declaration that the defendant, Mussummat Harbans Kunwar, by reason of her conduct in entering into the said compromise, had ceased to be entitled to any rights in the estate of her deceased husband, Bishambhar Prashad Singh, and that the plaintiff was entitled to the present possession of that estate; a declaration of the plaintiff's reversionary right in case she should not be held entitled to the possession of the property in dispute during her mother's life-time; and for other relief. The Subordinate Judge gave the plaintiff a declaration that the compromise and the decree of the 30th August, 1904, which was made on the basis of that compromise, were not binding upon her and, on the ground that the plaintiff was not entitled to get possession of the property during the life-time of her mother, dismissed the suit so far as the claims for possession and mesne profits were concerned. The High Court in Appeal by its decree

1. (1906) L. R. 33 I. A. 128, 132.
2. (1890) L. R. 18 I. A. 9; I. L. R. 18 C. 341.

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dismissed the suit. From that decree of the High Court this appeal has been brought.

The plaintiff and the defendant Durga Prashad Singh are descended from Lal Behari Singh, who died on the 24th October, 1885, leaving him surviving two sons, then minors, Bishambhar Prashad Singh, the plaintiff's father, and the defendant, Durga Prashad Singh, his mother, Mussummat Gulab Kunwar, and his widow, Mussummat Mohan Kunwar. The family of Lal Behari Singh was a joint Hindu family, governed by the law of the Mitakshara. Bishambhar Prashad Singh died on the 2nd August, 1902, leaving surviving him only one child, the plaintiff, and Mussummat Harbans Kunwar, his widow. The compromise referred to was made in a suit which Durga Prashad Singh had brought on the 7th May 1904, against Mussummat Harbans Kunwar, her daughter the plaintiff, then and still a minor, and other persons. In his plaint in that suit Durga Prashad Singh alleged that his brother Bishambhar Prashad Singh had been born blind and was excluded from inheritance to his father's estate by reason of his congenital blindness; that all the proceedings in a suit against Bishambhar Prashad Singh for partition which Durga Prashad Singh's father-in-law, Mahabir Prashad Singh, had, on the 25th January, 1900, brought, assuming to act as his guardian and next friend, were illegal; and that no partition had taken place.

If Bishambhar Prashad Singh was not disqualified from sharing in the family properties, he was entitled on separation to a moiety of the property of the joint Hindu family, and if in fact he did, in such circumstances, separate from his brother Durga Prashad Singh, Mussummat Harbans Kunwar was on his death entitled to a Hindu widows's interest in his moiety, and on her death the plaintiff would inherit to her father. By the compromise which is in question in this suit Mussummat Harbans Kunwar for herself and her daughter, the plaintiff, abandoned all claim to the property of Bishambhar Prashad Singh, admitted that Bishambhar Prashad Singh had been born blind, and was consequently excluded by Hindu law from all right of inheritance; that he and his brother Durga Prashad Singh had not separated; and that Durga Prashad Singh was entitled to the whole family property by survivorship. By the compromise Durga Prashad Singh gave to Mussummat Harbans Kunwar six villages, representing about one-fourth of the family

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property for her life, with remainder to the plaintiff, and undertook to pay certain debts.

It has been admitted on both sides that Bishambhar Prashad Singh was in fact blind at the time of his death. The Subordinate Judge found that Bishambhar Prashad Singh was not born blind. He also found that Mussummat Harbans Kunwar, who is a Purdanashin lady, was not given a sufficient opportunity of obtaining independent advice as to the terms of the compromise before entering into it. The High Court in the appeal did not expressly find that Bishambhar Prashad Singh had or had not been born blind, but came to the conclusion that Durga Prashad Singh had reasonable grounds for believing that there existed materials for a *bona fide* litigation and compromise, and that the question was not whether Durga Prashad Singh was right in his claim that Bishambhar Prashad Singh had been excluded from a right to share in the family property by reason of his having been born blind, but was whether Durga Prashad Singh honestly believed that Bishambhar Prashad Singh had been born blind.

The main questions upon the determination of which the decision of this appeal must, in their Lordships' opinion, depend are, firstly, is a man who is a member of a joint Hindu family, which is governed by the law of the Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital; secondly, was Bishambhar Prashad Singh, who was the father of the plaintiff born blind; and, thirdly, did Bishambhar Prashad Singh, and his brother, the defendant, Durga Prashad Singh, separate and remain separate. The first of these questions is a question of law, the second and third are questions of fact.

It will be convenient to deal at once with the first question, that of law. In his written statement the defendant, Durga Prashad Singh, alleged that Lal Behari Singh died—

"leaving him surviving two sons, namely, the plaintiff's father, Babu Bishambhar Prashad Singh, and this defendant, and Mohun Kunwar, widow, and Gulab Kunwar, mother; but the plaintiff's father never succeeded him, nor could he succeed him, according to law, as he was congenitally blind."

The first ground of Durga Prashad Singh's memorandum of appeal to the High Court was :—

"1st. For that, upon the entire evidence on the record, the Court below ought to have held that Bishambhar Prashad Singh was congenitally blind and

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he had no right to succeed to his paternal estate; the reasons assigned by the said Court for holding otherwise are erroneous and unsound."

The 17th ground of that memorandum of appeal was as follows:—

"For that even assuming, without admitting, that Bishambar was not born blind. but became blind after birth as alleged by the plaintiff, the Court below ought to have held that, according to the Mitakshara law of the the Benares School, he was excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition."

It does not appear that the 17th ground of that memorandum of appeal was relied upon in the High Court, but as the point has been raised and pressed before this Board in this appeal, their Lordships will now deal with it.

The question as to whether blindness which is not congenital excludes by Hindu law a member of a joint Hindu family from sharing the family property does not appear to have been decided by this Board. The text of Manu on this subject, as translated, is as follows: "Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."

In 1874 the High Court at Calcutta, in *Mohesh Chander Roy and others* v. *Chunder Mohun and others* [1], a case in which the law of the Dayabhagha applied, decided that the blindness which, under the Hindu law as recognised in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which supervened after birth. In that case the High Court Judges had before them the text of Manu which is above quoted.

In 1876 the High Court at Bombay in *Murarji Gokuldas and others* v. *Parvatibai* [2] decided that according to the Hindu law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital. In the latter case, Sir Michael Westropp, C. J., in a learned and exhaustive judgment, after considering the texts and authoritative commentaries bearing on the subject, including the text of Manu and the Mitakshara, said that:—

"Upon the best consideration we [he and Sargent, J.] have been able to give to this question, we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital."

The Sanskrit word in the Mitakshara on this subject has been translated as "a blind man." The description "a blind

1. (1874) 14 Ben. L.R. 273. 2. (1876) I. L.R., 1 B. 177.

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man," if that be the corr ct translation, is somewhat indefinite, and their Lordships con ider that, if that be the correct translation it is not to be assumed that the author of the Mitakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu and to exclude from a share in the heritage persons who become blind after they were born.

As was observed by Jackson, J., in *Mohesh Chunder Roy* v. *Chunder Mohun Roy*, [1] to which reference has been made above : "A rule of Hindu law, which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable." Rajkumar Sarvadhikari, in his "Hindu Law of Inheritance," p. 956, says :—

"Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu law, excludes a person from inheritance."

The above is, their Lordships hold, the true rule.

The oral evidence on the question as to whether Bishambhar Prashad Singh was born blind is very conflicting, but on the whole their Lordships would be prepared to find on the oral evidence, if it stood alone, that Bishambhar Prashad Singh's blindness was not congenital. There are, however, facts proved by records and other documentary evidence which can lead to no other conclusion than that Bishambhar Prashad Singh was not blind when he was born, and was treated by the family and by others as a person entitled to share in the family property.

Lal Bahari Singh, who was the father of Bishambhar Prashad Singh and Durga Prashad Singh, died on the 24th October, 1885, when they were minors, Bishambhar Prashad Singh being then about 9 years old and Durga Prashad Singh being then about 1½ years of age. On the 7th December, 1885, their grandmother, Mussummat Gulab Kunwar, and their mother, Mussummat Mohun Kunwar, presented a joint petition to the District Judge of Gaya in which they stated that Bishambhar Prashad Singh and Durga Prashad Singh, the minor sons of Lal Bahari Singh deceased, were "as heirs of their deceased father the owners in possession of all the properties, the approximate value of which is given below," and they prayed that a certificate of guardianship under Act XL of 1858 might be granted to them "for the protection of the person and the administration of the properties of the minors." On that petition the

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District Judge on the 12th February, 1886, appointed Gulab Kunwar and Mohun Kunwar to administer the estate of the minors during their minorities and they were appointed guardians. The names of the minors were entered in the land register as the names of owners, and Gulab Kunwar and Mohun Kunwar continued to manage the estate on behalf of and for the joint benefit of the minors until Mohun Kunwar died late ln the year 1897.

After the death of Mohun Kunwar, Mussummat Gulab Kunwar acted as sole-guardian until Bishambar Prashad Singh came of age.

On the 17th June, 1897, Bishambar Prasad Singh presented a petition to the District Judge of Gaya in which he stated that he had attained the age of majority, and was willing to look after his own business without the guardianship of Gulab Kunwar and Mohun Kunwar. Notice was thereupon given by the District Judge to the guardians to produce the certificate of guardianship, and to show what objection they might have. On the 4th September, 1897, they filed their objection, and in it stated that they had no objection to Bishambhar Prashad Singh being declared major, and that they had given up the management in respect of his share and he was looking after his affairs ; but they objected that the management of the affairs of Durga Prashad Singh should remain with them as he was still a minor, and they stated that they "have and can have no objection to whatever proceedings may be taken by the Court with regard to the share of Babu Bishambhar Prashad Singh." The District Judge declared Bishambhar Prashad Singh of age. On the 29th September, 1898, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated :—

"1. That Mussummats Gulab Kunwar and Mohun Kunwar were appointed guardians of your petitioner and his brother Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, by an order of the Court, dated the 12th February, 1886.

"2. That Mussummat Mohun Kunwar died in Assin 1305=1897.

"3. That the two brothers are joint.

"4. That your petitioner attained his age of 21st year in March 1897, and that he was declared major by the order of this Court.

"5. That under the law no certificate of guardianship is necessary in a joint family, and the property or share of Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh not being defined, no guardian of his property should be appointed or retained, nor could the certificate of guardianship of the properties of the two brothers have any effect after the attainment of majority by any of them.

"6. That consequently now as your petitioner represents the whole estate of your petitioner and his brother, there is no necessity of retaining the said Mussummat Gulab Kunwar as the guardian of the minor Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, nor can she under the law continue to be his guardian."

"Your petitioner therefore prays that under S. 39, Clause (1), Act VIII of 1890, your Honour will be graciously pleased to declare that the guardianship of Mussummat Gulab Kunwar has terminated, and cancel the certificate of guardianship dated the 12th February, 1886, aforesaid, or pass such other order and grant such relief as may to your Honour seem just and fit."

In reference to that petition the District Judge made the following orders:—

"2nd December, 1898. Return of service of notice on Mussammat Gulab Kunwar filed. House service made. Identifier not come. One week given."

"9th December, 1898. Affidavit of identifier."

"10th December, 1898. The grandmother is the sole surviving guardian, and she is said to be an old woman of about 80, and files no objection. They all live together, so there is no question of the personal benefit of the minor. The elder brother as the karta of the family has the inherent right to guardianship, and the previous order of guardianship to the grandmother has become infructuous since he attained his majority. It will therefore be revoked."

After the order of guardianship had been revoked, Bishambhar Prashad Singh managed the family properties for himself and for his brother Durga Prashad Singh, and on their joint behalf brought suits and obtained decrees. He gave way to bad habits, became extravagant and contracted debts. On the 25th January, 1900, Mahabir Prashad Singh, who was the father-in-law of Durga Prashad Singh, then a minor, as the next friend of Durga Prashad Singh, brought a suit for partition against Bishambhar Prashad Singh, in the Court of the Subordinate Judge of Gaya, and in the plaint stated—

"that according to the Mitakshara school of law, the plaintiff [Durga Prashad Singh] and the defendant [Bishambhar Prashad Singh] are the proprietors in equal shares of all the joint properties specified and detailed in Schedule No. 1 of this plaint."

It was also alleged in this plaint—

"that the defendant [Bishambhar Prashad Singh] is blind from birth and is wholly incapable of managing the joint properties, and owing to his being blind and an extravagant man the properties are being wholly ruined."

And it was further alleged in the plaint in that suit—

"that if the properties of the said joint family are allowed to remain in the hands of the defendant [Bishambhar Prashad Singh], he will ruin all the joint properties before your petitioner [Durga Prashad Singh] attains majority, and your petitioner will be put to difficulty and subjected to unnecessary expenses in seeking redress after his attaining majority. Hence the plaintiff [Durga Prashad Singh] has no other remedy than to get the properties partitioned. Therefore the plaintiff's necessity to bring this suit."

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Mahabir Prashad Singh has not been called as a witness in this suit, nor has his absence been satisfactorily accounted for. On behalf of Durga Prashad Singh it has been suggested that his father-in-law, Mahabir Prashad Singh, was acting in collusion with and in the interests of Bishambhar Prashad Singh—an insinuation which appears to their Lordships to be wholly groundless.

The statement in the plaint that Bishambhar Prashad Singh was blind from birth was irrelevant, and, further, it was inconsistent with the claim that the family property should be partitioned between the brothers.

There was and could have been no defence to that suit for partition. Durga Prashad Singh, on whose behalf the suit was brought, was entitled to have his share partitioned off. The suit was compromised and by consent and with the sanction of the Subordinate Judge as to the compromise a decree for partition was made.

In accordance with that decree for partition the immoveable property was partitioned, and the shares of the brothers were divided by metes and bounds, the name of each brother was entered in the Land Register in respect of his separated share and such of the moveable property as was capable of being divided was divided between them, and complete separation between them was effected.

It has been said that Mussummat Gulab Kunwar and Mussummat Mohun Kunwar did not know that under the Hindu law a person who was born blind was thereby disentitled to share in family property. It is inconceivable that ladies in their position could have been in ignorance of that well-known rule of the Hindu law, and if the evidence which was given on behalf of Durga Prashad in this suit was true those ladies had several male relations and friends who were aware that Bishambhar Prashad Singh was born blind and who must have known what the state of Hindu law was. It has also been said that the action of Gulab Kunwar aud of Mohun Kunwar is explainable on the supposition that they did not wish to deprive Bishambhar Singh of a share in the family property. That is an explanation which their Lordsdips cannot accept.

If Bishambhar Prashad Singh had been in fact born blind his mother, Mohun Kunwar, and his grandmother, Gulab

Kunwar, must have known from the time of his birth that he suffered from congenital blindness. It must have been a fact of which neither of them, nor the plaintiff nor any near relation of the family could have been in ignorance; but the first time when it was alleged that Bishambhar Prashad Singh had no right to share in the family property was when Mussummat Harbans Kunwar, after the death of Bishambhar Prashad Singh, applied to the District Judge of Patna for a certificate under Act VII of 1889.

To that application Mussummat Gulab Kunwar, on behalf of Durga Prashad Singh, on the 10th December, 1902, filed an objection in which she stated:—

"3. That the aforesaid Bishambhar Prashad Singh was born blind and died as such. 4. That the aforesaid Bishambhar Prashad Singh had no right to any properties which were ancestral to the family under law, and the petition is therefore liable to be rejected."

Their Lordships have without any doubt come to the conclusion that Bishambhar Prashad Singh was not born blind, and that Durga Prashad Singh could not possibly have been in ignorance or in doubt as to that fact, and had, when he induced Mussummat Harbans Kunwar to enter into the compromise on behalf of the plaintiff which is in question in this suit, no honest and *bona fide* belief in the claim which he was making. That compromise, and the decree which was made in pursuance of it, could not be allowed to affect in any way the right of the minor, and she was entitled to the declaration which the Subordinate Judge made in her favour. In order to avoid any possible misconception arising as to the meaning of the decree of the Subordinate Judge, the following words—"whose action in connection therewith may be construed as one done for the transfer of the property left by her husband"—must be omitted from that decree. With that omission the decree of the Subordinate Judge should be affirmed, and the decree of the High Court in the respondents' appeal should be set aside with costs. As regards the appellant's appeal to the High Court with reference to the question of possession, the appeal against the High Court's decree was not argued before their Lordships, and under these circumstances the decree of the High Court will stand. The respondents Durga Prahad Singh, Ritu Singh, Lachmi Narayan Rajput and Tori Mahton must pay the costs of the appeal to His Majesty in Council and of their appeal to the High

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Court, Upon the appellant's cross-appeal to the High Court, the High Court made no order as regards the costs, and this decree stands.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant :—*Barrow Rogers & Nevill.*

Solicitors for Respondents :—*T. L. Wilson & Co.*

A. P. P.

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## PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the Judicial Commissioner in Baluchistan.]

Abdullah Ashgar Ali Khan ... *Defendant* Appellant*

*v.*

Ganesh Dass ... *Plaintiff-Respondent.*

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Abdullah Ashgar Ali Khan v. Ganesh Dass.

Res judicata—" *heard and finally decided "—proceedings in a former suit—decision not on the merits, effect of in subsequent proceedings—S.* 10 *British Baluchistan Regulation* 9 *of* 1896.

To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. An estoppel by judgment arises only when the " matter in issue " has been " finally decided. "

S. 10 of the British Baluchistan Regulation 9 of 1896 is identical in effect with S. 11 of the Indian Civil Procedure Code.

When therefore, in a suit on a bond brought in British Baluchistan, the defence was that the bond had been obtained by fraud, and a previous suit by defendant for cancellation of the bond on that ground had been dismissed by two Courts on the merits, but in the third (the final Appellate Court) the dismissal had been upheld solely because the suit was not properly constituted.

*Held*, that the issue as to fraud had not been " heard and finally decided " within the meaning of S. 10 of the Regulation, and that the defence based on that allegation was still open to defendant.

*Sheosagar Singh* v. *Sitaram Singh* [1], followed.

Appeal from a decree of the Judicial Commissioner in Baluchistan, dated March 31, 1914, affirming a decree of the District Judge of Quetta-Pishin.

The facts of the case are sufficiently stated in their Lordships' judgment. The Lower Courts decreed plaintiff's suit on the ground that the defence was bound by *res judicata.*

*Dunne* for Appellant :—The Indian law is that there is no final decision if a judgment is appealed, and that an issue is never finally decided if the appeal is not decided on the merits. Where

1. (1897) L. R. 24 I. A. 50 ; I. L. R. 24 C. 616

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the decision of a lower Court is appealed to a superior tribunal which for any reason does not think fit to decide the matter, the question is left open and is not *res judicata*.

*Balkishen* v. *Kishen Lal* [1], *Gungabishen* v. *Roghoonath* [2], *Chunder Coomar* v. *Sib Sundari* [3], *Sheosagar Singh* v. *Sitaram Singh* [4].

The effect of the decisions is that on the real issue you are entitled to the judgment of the Court: that you are not to be deprived of it because the Court has chosen to dismiss another suit for some other reason. The final Appellate Court in the former suit never went into the merits at all.

*Dube* for Respondent;—The point finally decided by the Judicial Commissioner in the former suit was in substance that the bond cannot be avoided so long as the dissolution stands. Defendant now seeks to avoid the deed of dissolution, which is unchallengeable while the former decision stands: the bond is only evidence.

*Dunne* replied.

Their Lordships' judgment was delivered (July 30, 1917) by

Mr. Ameer Ali

*Mr. Ameer Ali*:—The only point for determination involved in this appeal turns upon the meaning to be attached to the words "finally decided" in S. 10 of the British Baluchistan Regulation IX of 1896. That section provides as follows:—

"A Court shall not try any suit in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties in the same rights, or between parties under whom they or any of them claim.

A short statement of the facts will explain how the question has arisen.

The parties to the litigation carried on certain business in British Baluchistan in partnership with two other men; in July 1910 they agreed to dissolve the partnership; according to the plaintiff, Ganesh Dass, accounts were duly adjusted, when a sum of over 9,900 Rupees was found due from the defendant, Ashgar Ali Khan; on the 12th July a formal deed of dissolution was executed by the four partners, and on the day following the defendant executed the bond on which the present suit is brought. The defendant's case is that he signed the deed of dissolution which embodied the settlement and executed the

1. (1888) I. L. R. 11 All. 148.
2. (1891) I. L. R. 7 Cal. 381.
3. (1882) I. L. R. 8 Cal. 631.
4. (1897) L. R. 24 I. A. 50.

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bond, agreeing to pay the amount alleged to be due from him, on the fraudulent representation of the plaintiff that the adjustment of accounts was correctly made and on the assurance that should the defendant upon the examination of the accounts at his leisure discover any mistakes they would be rectified. The defendant alleges that it was on the faith of these representations he executed the two documents. He further alleges that some days after the execution of the deed of dissolution and the bond in suit he had an opportunity to examine the statement of account, which he found to be wholly incorrect and misleading, that thereupon he called upon the plaintiff and the other partners to make a proper adjustment, undertaking to pay any amount that might on such further examination be found due from him. The plaintiff, Ganesh Dass, refused to accede to the proposal, and thereupon the defendant brought a suit on the 22nd July, 1911, in the Court of the Assistant Commissioner of Quetta for a cancellation of the bond of the 13th July 1910, on the ground that he was induced to execute it by the fraudulent representations of the present plaintiff. The written statement of Ganesh Dass is not on the record of this appeal, but it appears from the judgment of the Judicial Commissioner in that case that among other pleas Ganesh Dass urged that, the bond being based on the dissolution deed and being merely executed to record the manner in which the payment of the amount due to him was to be made, a suit for the cancellation of the bond alone would not lie.

The defendant's suit for cancellation of the bond came for trial before the Assistant Commissioner of Quetta, and he held that the defendant, Ashgar Ali Khan, had failed to establish his allegation of fraud. He accordingly dismissed the action, and his judgment was affirmed on appeal by the District Judge on the 30th May, 1913.

The defendant thereupon preferred a second appeal under the provisions of Regulation IX of 1896 to the Court of the Judicial Commissioner of British Baluchistan, which is the final Appellate Court in that province. The Judicial Commissioner, Mr. Archer, considered that the objection of Ganesh Dass to the frame of the suit was well founded, and accordingly, without entering into the merits of the case, dismissed the defendant's appeal against the orders of the Lower Courts dismissing his action.

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The Judicial Commissioner gave his decision in the following words, the exact import of which is not disputed. He says first :—

"Now it appears to me obvious that the respondent's objection to the frame of the suit was well founded, and that the plaint should either have been returned for amendment or rejected."

And then, after commenting on several mistakes inprocedure in the Courts below, he proceeds as follows :—

"I purposely refrain from going in detail into the merits of the case because they cannot be discussed without bringing in the question of the validity of the dissolution agreement, a matter which is not formally before the Courts. It is sufficient to say that after careful consideration of the record and the pleadings I am not prepared to interfere with the orders of the lower Courts dismissing the appellant's suit, since, for the reasons given above, I hold that the bond of which cancellation is sought is merely consequential on the deed of dissolution of partnership, and that a suit for avoiding the bond cannot succeed as long as the dissolution deed remains in force."

On the 14th October, 1912, the plaintiff, Ganesh Dass instituted the present suit on the bond executed by the appellant on the 13th July, 1910. The defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff.

It is to be observed that whilst this suit was pending in the Court of the Judicial Commissioner the defendant brought an action to have the deed of dissolution cancelled, on the ground of fraud, but it was held that it was barred under the statute of limitation.

In Ganesh Dass's suit on the bond the Indian Courts have held that the issue raised by the defendant was *res judicata,* and that they were precluded by the provisions of S. 10 of Regulation IX of 1896 from entering upon an enquiry whether the bond had been obtained from him on fraudulent representation. In this view they decreed the plaintiff's claim without entering into the merits of the defence. The defendant has appealed to His Majesty in Council, and it is contended on his behalf that the Indian Courts have wrongly applied the rule of *res judicata* to the defence in the present case, as his allegation regarding the execution of the bond on the fraudulent representations of the plaintiff has never been decided in the Judicial Commissioner's Court.

It appears to their Lordships that the contention is well-founded. "The matter in issue" in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that although the two first Courts had found against his allegation, the final Court of Appeal refused to determine the

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issue. S. 10 of the Regulation creates an estoppel by judgment only when the "matter in issue" has been "finally decided." These words have received judicial interpretation in the case of *Sheosâgar Singh* v. *Sitaram Singh* [1].

In that case the Board had to deal with the identical question of *res judicata* arising under S. 11 of the Indian Civil Procedure Code, which, so far as the question under discussion is concerned, is *in pari materia* with S. 10 of the Baluchistán Regulation. Lord Macnaghten, delivering the judgement of their Lordships, explained the rule as follows:—

" To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided.' If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the Lower Court was superseded by the judgment of the Court of Appeal. And the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was no decision ought to have been pronounced on the merits.''

Their Lordships will therefore humbly advice His Majesty that the judgments of the Courts in India in this case should be set aside and that it should be remitted to the Judicial Commissioner of British Baluchistan to direct a retrial by the Court of First Instance. The respondent will pay the costs of this appeal and of the application made on his behalf on the 19th July, 1917; the costs incurred by the parties in India will abide the result.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondent:—*W. W. Box & Co.*

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1. (1897) L. R. 24 I. A. 50.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

## [FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR, AND MR. JUSTICE KUMARASWAMI SASTRI.

Vaddadi Sannamma ... *Appellant** (*Petitioner*).

v.

Koduganti Radhabhayi. and others... *Respondents* (*Respondents*).

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*Civil Procedure Code. Act V of 1908. S. 47—Explanation—" defendant against whom a suit has been dismissed, " meaning of.—Person properly impleaded, but against whom suit is dismissed as plaintiff abandoned part of his claim—Whether a party to suit within the meaning of S. 47—Madras Proprietary Estates Village Service Act S. 17—Mortgage of Village service inam lands after the grant of title-deed of enfranchisement but before the notification—Whether valid and operative.*

When a party has been properly impleaded as one of the defendants in a suit and the case against him would have proceeded to judgment, but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is a " defendant against whom a suit has been dismissed " within the meaning of the explanation to S. 47 of the Civil Procedure Code.

A mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement, but before the date of the notification contemplated under S. 17 of the Madras Act II of 1894, is illegal and inoperative when it is made and does not become operative on the subsequent enfranchisement of the lands.

Where the Government issued an inam title-deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit rent in addition to the existing jodi payable to the proprietor and it said nothing about the enfranchisement of the inam or the lands from the condition of service, they remain liable as before and continue to form the emoluments of the village office until the issue of the notification. The lands therefore continue subject to the prohibition against any incumbrance and any alienation of the inam lands prior to the notification is void at the time it is made.

S. 43 of the Transfer of Property Act has not the effect of validating the alienation after the notification, by the transfer operating on the alienable interest acquired by the transferor.

Appeal against the order of the District Court of Vizagapatam dated 2nd August 1916, in Appeal Suit No. 414 of 1915 preferred against the order of the Court of the District Munsif of Chodavaram in M. P. No. 800 of 1915 in E. P. No. 241 of 1915 in O. S. No. 384 of 1913.

*Hon. Mr. B. N. Sarma* for Appellant.

*C. Rama Rao* for *P. Narayana Murthi* for 1st Respondent.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Abdur
Rahim, J.

*Abdur Rahim, J.* :—The lands to which the dispute relates appertain to a village service inam and are situate in a proprietary

* A. A. A. O. No. 132 of 1916. 21st November, 1917.

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estate. The authorities having decided to enfranchise the inam, the inam title-deed was granted on 18th August 1906 but the notification spoken of in S. 17 of Madras Act II of 1894, fixed 1st April 1911 as the date from which the enfranchisement would take effect. Between these two dates, *i. e.*, on 23rd January 1909 these lands described by the mortgagors as 'the enfranchised mirasi and inam lands belonging to us' were mortgaged to the appellant who subsequently in 1915 obtained an ordinary mortgage decree. The first respondent also had a mortgage on the same property and sued to enforce it making the appellant a party; but being advised that a mortgage of service inam lands was unenforceable, he gave up his claim on the mortgage and obtained a simple money decree against mortgagors, his suit being dismissed as against the appellant. The first respondent's decree was in 1914, *i. e.*, before the decree of the appellant. The properties being attached in execution of the former money decree, the latter asked by a petition in the execution proceedings that the lands may be sold subject to his mortgage decree. That petition has been rejected and the appeal is against that order.

The respondent has taken the preliminary objection that no appeal lies, contending that although the appellant was impleaded as a party to the suit and his name is borne on the decree, he is not 'a party to the suit in which the decree was passed' within the meaning of S. 47 of the Code of Civil Procedure, inasmuch as he ceased to be a proper party when the respondent gave up his claims on the mortgage. This proposition is laid down by Ayling and Kumaraswami Sastri, JJ., in *Krishnappa Mudali* v. *Periasami Mudali* [1], but Sadasiva Aiyar and Phillips, JJ., held otherwise in an unreported case (Second Appeal No. 888 of 1916). It seems to me with all respect that in the former decision sufficient effect has not been given to the plain language of the section which is made still clearer by the explanation attached to it. The explanation says "For the purposes of this section, a defendant against whom a suit has been dismissed is a party to the suit." Nor can it be said that it is the duty of a Court charged with execution of a decree to see that a defendant against whom the suit has been dismissed was properly made a party or not. Having in view however the conflict of views expressed in *Krishnappa Mudali* v. *Periasami*

1. (1917) 32 M. L. J. 532.

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*Mudali* [1] and Second Appeal No. 888 of 1916, the question should be solved by a Full Bench.

Upon the merits, S. 43 of the Transfer of Property Act has been invoked to validate the mortgage in favour of the appellant. But it has been ruled by this court that that section has no application to alienations which are prohibited by law on the grounds of public policy. The matter is fully discussed by the learned Chief Justice in *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Raja Kandukuri Balasurya Prasada Row* [2], with which I respectfully agree. The same view of the law is expressed in *Narahari Sahu* v. *Korithan Naidu* [3], *Batchu Ramayya* v. *Dara Satchi* [4], *Karri Ramayya* v. *Villoori Jagannadhan* [5], while a different view prevailed in *Angannayya* v. *Narasanna* [6]. The decision in the last case is in direct conflict with the other decisions, all relating to alienations of service inam lands. And in my opinion the present case cannot be effectively distinguished from these by reason of the fact that on the date of the appellant's mortgage the inam title-deed had been issued, though the notification was not issued till long afterwards. When S. 17 of Madras Act II of 1894 expressly says that the enfranchisement shall take effect only from the date of the notification, it seems to me that before that date the legal incidents attaching to the property including its inalienability remained unaltered. It could not be said that by issuing the title-deed the Government bound itself by way of contract to issue the notification, though the notification was certain to issue in ordinary course and in the latter sense it would be right to say that this expectation of the inam holder was not a 'mere possibility.' If the mortgagee could not rely on any contract in favour of the mortgagor, I find it still more difficult to say that the inam title-deed by itself created some sort of inchoate interest in the property free from all restraint of alienation, although the Act says that, the enfranchisement shall have no effect except from the date of notification. But as there is a conflict of decisions on the applicability of S. 43 to Village Service Inams, I think this question also should be referred to the Full Bench.

I would therefore refer the following questions to a Full Bench for opinion:

1. (1917) 32 M. L. J. 532.
2. (1915) 28 M. L. J. 650.
3. (1913) 24 M. L. J. 462.
4. (1913) 14 M. L. T. 430.
5. (1915) 18 M. L. T. 360.
6. (1908) 18 M. L. J. 247.

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(1) Is a person who was impleaded as a defendant in a suit and against whom the suit is dismissed by the decree, a party to the suit in which the decree was passed within the meaning of S. 47 of the Code of Civil Procedure, if the dismissal of the suit against him was due to the fact that at the trial the plaintiff abandoned that part of his claim by reason of which the defendant would be a proper party to the suit?

(2) Is a mortgage of village service inam lands in a proprietary estate executed after the grant of the title deed of enfranchisement but before the date of the notification contemplated under S. 17 of the Madras Act II of 1894 valid and operative?

Bakewell, J.

*Bakewell, J.* :—By S. 17 of the Madras Proprietary Estates Village Service Act, 1894, the Government was empowered to enfranchise lands granted as remuneration of a village office from the condition of service, but "such enfranchisement" was declared to "take effect on or after the date fixed in the notification issued under S. 19 for the levy of a village service cess." That is to say the Government might perform the act constituting an enfranchisement but its operation was suspended until provision had been made for the remuneration of the services on which the land had been previously held. The holder of the office therefore retained the land on the former tenure until such provision had been made, but he acquired a further interest in the land which on the occurrence of the prescribed event would ripen into an absolute interest. In my opinion such an interest is assignable, and is not a mere possibility of a like nature with a chance of an heir apparent succeeding to an estate or the chance of a relation obtaining a legacy on the death of a kinsman within the meaning of S. 6 of the Transfer of Property Act, 1882, since it would become an absolute interest in the ordinary course of business.

In the present case the holder of the lands, after the execution of a deed of enfranchisement but before a notification had been issued by Government for the levy of cess, purported to transfer by way of mortgage "enfranchised mirasi and inam lands" held on service tenure, and I think that this was a transfer of the inchoate interest which I have described. The transfer could not operate to convey the subsisting interest in the lands in so far as it consisted of a service tenure (Madras Act III of 1895, S. 5), but on the issue of the notification that interest became extinguished and the interest which passed under the mortgage became absolute,

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without any further act of the parties. The petitioner had therefore a valid security and was entitled to apply to the Court that an attachment of the lands should be declared subject thereto.

The decree under which the attachment was issued contains the name of the petitioner as party defendant, and recites the plaintiff's claim as being for a sum due on a mortgage and the decretal portion directs that the suit be dismissed as against the petitioner. The petitioner was a proper party to the suit as framed and the form of the decree was due to the relinquishment by the plaintiff of his claim under his mortgage and his acceptance of a simple money decree. The case in my opinion falls precisely within the explanation to S. 47 of the Code of Civil Procedure, and the petitioner was a party to the suit and this appeal accordingly lies.

Having regard to the differences of opinion mentioned by my learned brother, I agree that the questions framed by him should be referred to a Full Bench.

*B. N. Sarma*, vakil for the Appellant.

*P. Narayanamurti*, vakil for the 1st Respondent.

The Court expressed the following

Wallis, C. J.

**Opinion**:—*The Chief Justice*:—I am clearly of opinion that, when a party has been properly impleaded as one of the defendants in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is "a defendant, against whom a suit has been dismissed," within the meaning of the explanation to S. 47, Civil Procedure Code. The case which came before the Court in *Krishnappa Mudali* v. *Periasami Mudali* [1], of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other cause of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of S. 47 goes far to defeat the prohibition of joinder, and such a construction of S. 47 should therefore be avoided

1. (1917) 32 M. L. J. 532.

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if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power which it now has under Order 1, rule 10 (2) of ordering at any stage of the proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* [1], have the effect of taking him out of the operation of S. 47, which ought not to apply to him seeing that he has no real concern with the suit. I would answer the first question in the affirmative.

As regards the second question, under S. 4 of the Madras Hereditary Village-offices Act, 1895, the word "emoluments" includes "lands and assignments of revenue payable in respect of such lands" and according to the finding the emoluments in this case included both the lands and an assignment of revenue arising out of them. Under S. 5 these emoluments are "not liable to be transferred or encumbered in any manner whatsoever," reproducing in substance the provisions of Regulation VI of 1831 which made such alienations null and void. S. 17 of the Madras Proprietary Estates' Village Service Act, 1894, provides that, "if the remuneration of a village-office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village-office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit-rent,—and such enfranchisement shall take effect from such date as Government may notify." Government in this case issued an inam title deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit-rent in addition to the existing jodi payable to the proprietor. It said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village-office until the issue of the notification which was after the date of the alienation now in question. The lands therefore continued subject to the prohibition against the incumbrance in any manner whatsoever and the alienation in question was undoubtedly void at the time it was made. As pointed

1. (1900) I. L. R. 23 Mad. 361=10 M. L. J. 123.

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out in the order of reference, there is a conflict of decisions in this Court as to whether the subsequent enfranchisement has the effect of validating such alienations. In 1907 it was held by White, C. J., and Miller, J., that, though the transfer was null and void under Regulation VI of 1831, yet after enfranchisement the transferee was entitled under S. 43 of the Transfer of Property Act to require that the transfer should operate on the alienable interest subsequently acquired by the transferor. No authority was cited, and the original illegality of the transfer was not referred to. On the other hand in *Narahari Sahu* v. *Korithan Naidu* [1], it was held on similar facts by, Sundara Aiyar and Benson, JJ., that S. 43 has no application to cases where the transfer is forbidden by law on grounds of public policy, referring to *Ramasami Naik* v. *Ramasami Chetti* [2]. This case was approved and followed in *Batchu Ramayya* v. *Dara Satchi*, [3], and *Karri Ramayya* v. *Villoori Jagannadhan* [4]. The decision in *Ramasami Naik* v. *Ramasami Chetti* [2], on which reliance was placed has since been followed in *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Rajah Kandukuri Balasurya Prasada Row* [5]. We have not been referred to any English decisions pointing the other way, and on the whole I think the sound position for us to proceed on is that no equities arise out of a transaction which is prohibited by law on grounds of public policy. The present case no doubt differs from the earlier cases because the transfer by way of mortgage purported to be of " enfranchised mirasi and inam lands" and was made after execution of the inam deed by which a quit-rent was imposed on the lands, a step which was intended to be followed, and was followed at an early date, by a publication of the notification enfranchising the lands. The transfer was none the less illegal when it was made, and on the whole I do not think there are sufficient reasons for departing from what I understand to be the general rule especially in the absence of English authority in point. In *Betteswo rth* v. *Dean of St. Paul's* [6], which is referred to by Lord Macnaghten in *Tailby* v. *The Official Receiver* [7], where a covenant in lease to renew for ninety-nine years which was lawful when made was rendered illegal by subsequent

1. (1913) 24 M. L. J. 462.
2. (1906) I. L R. 30 Mad. 255=17 M. L. J. 201
3. (1913) 14 M. L. T. 430. 4. (1915) 18 M. L. T. 360.
5. (1915) 28 M. L. J. 650.
6. Sel. Cas. in Ch, 66, 1 Bro. P. C. 240. 7. (1888) L. R. 13 A. C. 523, 552.

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statutes, it was held by the House of Lords, that, as the statutes permitted leases for forty years, specific performance by executing a fresh lease for forty years might be decreed, but in that case the original agreement was lawful, and it does not cover the present case where the transaction was illegal at the time it was entered into. As regards the second question my answer is that the transfer was cleary illegal and inoperative when it was made and did not become operative on the subsequent enfranchisement of the lands.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.* :—I agree with my Lord in the answers to be given to the two questions referred to us.

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—I agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

Prativadi Bhayankaram Pichamma *alias* Mangamma. *Petitioner* Counter-Petitioner-Plaintiff*).

*v.*

Kamisetti Sreeramulu, and others. *Respondents (Petitioners-Defendants 2, 3 and 5).*

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Pichamma v. Sreeramulu.

*Civil Procedure Code, (Act V of 1908) O. 17 Rr. 2 and 3—Scope of—Rules independent and mutually exclusive—Rule 3 applies only when parties are present on the adjourned date.*

*Per Sadasiva Aiyar* and *Kumaraswami Sastri, JJ.*

Rules 2 and 3 of Order 17 of the Civil Procedure Code are independent and where the requisites of rule 2 are satisfied that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of R. 3.

Rule 3 applies only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do.

*Chandramathi Ammal* v. *Narayanaswami Aiyar* [1] followed.

*Per Chief Justice* : When a case is called and the defendant is absent and the Court resolves to proceed against him exparte, there is nothing to prevent the court from applying the provisons of O. 17 R. 3 and disposing of the suit notwithstanding the defendants' failure to do what he had been granted time to do, but that disposal will be none the less exparte and the decree will be liable to be set aside under O. 9 r. 13.

There is no conflict at all between the two rules, O. 17 rules 2 and 3, and each may be fully applied at the proper stage of the case.

The decision in 33 Mad. 241 in so far as it laid down that the two rules must be read as mutually exclusive went too far.

* C. R. P. No. 1248 of 1916. 21st November 1917.

1. (1909) I. L. R. 33 M. 241=19 M. L. J. 760.

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Pichamma v. Sreeramulu

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the Subordinate Judge of Kistna at Ellore in Miscellaneous Appeal No. 233 of 1916 preferred against the order of the Court of the Additional District Munsif of Kovvur at Ellore dated 15th March 1916 in Civil Miscellaneous Petition No. 154 of 1916 in Original Suit No. 49 of 1915.

This case came on for hearing in the first instance before their Lordships. (Abdur Rahim and Oldfield, JJ.) when they made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Abdur Rahim, J.

*Abdur Rahim, J.* :—The question in this appeal relates to the interpretation of rules 2 and 3 of Order 17 of the Code of Civil Procedure. . What happened in this case is shortly stated in the judgment of the Subordinate Judge. The suit was instituted first in the Court of the District Munsif of Kovur and afterwards transferred to that of the Additional District Munsif. In the latter Court, the plaintiff examined most of his witnesses and on the application of the defendant, the suit was adjourned to 7th February 1916. On that date neither the defendants' guardian nor the vakils were present. The District Munsif closed the case and delivered judgment in favour of the plaintiff on the 8th February 1916. There is in my opnion conflict of rulings in this Court as to whether rule 2 or rule 3 of Order 17 applies to facts like these. In *Naganada Aiyar* v. *Krishnamurti Aiyar* [1], which was a judgment of Munro, J., and myself, it was held that S. 158 of the old Code empowers the Court in circumstances such as those in this case to decide the suit on the merits whether the party at whose instance the adjournment was granted was present or not at the date fixed for hearing. If the parties or any of them fail to appear on the fixed date, it is open to the Court to proceed either under S. 157 or 158. If there are no materials before the Court on which to come to a proper decision on the merits, it would ordinarily deal with the case under rule 2, otherwise under rule 3. In the case in *Naganada Aiyar* v. *Krishnamurthi Aiyar* [1], an earlier decision of this Court reported in *Chandramathi Ammal* v. *Narayanasami Aiyar*, [2] to which the present learned Chief Justice and Krishnaswami Aiyar, J., were parties,

1. (1910) I. L. R. 34 Mad. 97=20 M. L. J. 585.
2. (1909) I. L. R. 33 Mad. 241; 19 M. L. J. 760.

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was not noticed. There it was held that S. 158 of the Old Civil Procedure Code, which corresponds to rule 3 of Order 17 of the new Code would only apply if the parties are in attendance and there is failure to do what a party is given time to do. If the parties are not in attendance, then according to that ruling, S. 157 of the old Code corresponding to rule 2, Order 17 of the present Code would alone apply and that these two rules are mutually exclusive. This view seems to have been approved in *Chenroyan* v. *Rama Chetti* [1] while the view propounded in *Naganada Aiyar* v. *Krishnamurthi Aiyar* [2] appears to be the same as that taken in *Enatulla Basunia* v. *Jiban Mohan Roy* [3].

The question is one of importance and frequently arises and I think that it ought to be settled by a Full Bench. The question therefore referred to the Full Bench is whether the view taken in *Chandramathi Ammal* v. *Narayanasami Aiyar*, [4] or in *Naganada Aiyar* v. *Krishnamurthi Aiyar*, [2] as to the proper scope and meaning of Order 17, rule 2 and rule 3, is correct.

Oldfield, J.

*Oldfield, J.*:—I agree to the reference proposed by my learned brother.

*B. Narasimha Rao* and *K. V. L. Narasimham*, Counsel for the Petitioner.

*P. Somasundaram*, Vakil for the Respondents.

The Court expressed the following:

Wallis, C. J.

**Opinion**:—*The Chief Justice*:—I am of opinion that *Chandramathi Ammal* v. *Narayanasami Aiyar* [4] to which I was a party was rightly decided. As the question is very fully dealt in the opinion of my learned brother, I shall merely state the conclusions at which I have arrived on further consideration. Under the Code, where the plaintiff appears and the defendant does not appear either on the day fixed for the first hearing [Order IX, rule 6 (1)] or on any day to which the hearing of the suit is adjourned [Order XVII, rule 2 read with Order IX, rule 6 (1)], the Court, if it is proved that the summons was duly served, may proceed *ex parte*. In either case, where the Court has disposed of the case *ex parte* and passed a decree against the absent defendant, he may, under Order IX, rule 13, move to set aside the decree on

1. (1916) 3 L. W. 524.
2. (1910) I. L. R. 34 M. 97.
3. (1914) I. L. R. 41 Cal. 956.
4. (1909) I. L. R. 33 M. 241.

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the ground that he was prevented by any sufficient cause from appearing when the suit was called on. When a case is called on and the defendant is absent, and the Court resolves to proceed against him *ex parte*, there is nothing, I am now of opinion, to prevent the Court from applying the provisions of Order XVII, rule 3 and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do, but that disposal will be none the less both in fact and in law *ex parte*, and the decree will be liable to be set aside by the defendant under Order IX rule 13. If the *ex parte* decree is set aside and the case restored and the defendant appears, it will still be open to the Court to apply the provisions of Order XVII, rule 3 after hearing what the defendant has to say in explanation of his failure to do what he had been given time to do. There is I think no conflict at all between the two rules, and each may be fully applied on this construction at the proper stage of the case. In so far as we laid down in *Chandramathi Ammal* v. *Narayanasami Aiyar*,[1] that the two rules must be read as mutually exclusive, I think we went too far.

With great respect I am unable to agree with any of the rulings or observations in the cases cited that take a different view.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.*—I have nothing to add to the judgment which my learned brother Kumaraswami Sastri, J., is about to pronounce and I entirely concur in it.

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.*:—The question raised by this reference relates to the scope of rules 2 and 3 of Order XVII of the Civil Procedure Code. Rule 1 empowers the Court on proper cause being shown to grant time to the parties at their instance and to adjourn the suit on such terms as to costs as it thinks fit. Rule 2 provides that if the parties or any of them fail to appear on the adjourned date, the Court may dispose of the suit in one of the modes directed in that behalf in Order IX or make such other order as it thinks fit. Order IX relates to the procedure to be followed on the date fixed in the summons for the parties to appear and provides for the consequence of non-appearance. Rule 3 provides that the Court may dismiss the suit if both parties fail to appear. Where the plaintiff appears and not the defendant, rule 6 empowers the Court to decide the suit *ex parte* if the

1. (1909) I. L. R. 33 M. 241.

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summons has been duly served on the defendant in time to enable him to appear. Where the defendant appears and not the plaintiff, rule 8 directs that the Court should dismiss the suit wholly or partially if the claim or any part is not admitted. Rule 9 entitles the plaintiff to have the dismissal set aside if he satisfies the Court that he had sufficient cause for non-appearance. Rules 7 and 13 enable the defendant who failed to appear to set aside the *exparte* order or decree against him on shewing proper cause for his non-appearance. Rule 3 of Order XVII empowers the Court to decide the suit forthwith notwithstanding the failure of either party to whom time is granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the progress of the suit. It will thus be seen that rule 2 of Order XVII empowers the Court to apply to adjourned hearings the same procedure to be followed in case of failure of the parties to attend at the first hearing. It however expressly empowers the Court instead of proceeding under Order IX to pass such other order as it thinks fit. There is therefore nothing to prevent the Court from adjourning the case to another day if the parties fail to appear and the Court thinks that in the interests of justice it should not dismiss the suit or decree it *ex parte*. This should be borne in mind as it has been strenuously argued before us on the strength of some of the observations in some of the decisions referred to in the course of argument that the view taken in *Chandramathi Ammal* v. *Narayanasami Aiyar*, [1] is likely to entail great hardship on the defaulting party. Where the Judge thinks that a defaulting party has proved his case, he is not bound to apply the provisions of Order IX but can adjourn the case to another day in case he fails to appear and I am sure no Judge with any sense of justice would dismiss a just claim which he considers proved *simply because a party fails to appear* on an adjourned date. On the other hand it seems to me to be pretty plain that the application of rule 3 will be the harder of the two courses as rule 3 empowers the Court to proceed to decide the suit forthwith on the materials before it. So far as the plaintiff is concerned the Court may dismiss the suit on the merits if the evidence on record does not prove plaintiff's case. It may pass a decree if the defendant is absent and there is formal proof of plaintiff's claim or the onus is on the defendant. The dismissal

1. (1909) I. L. R. 33 M. 241

of the suit or passing of a decree being on the merits, the only remedy of the party aggrieved will be by appeal or review. It is difficult to see what the use of an appeal will be if there was no application for adjournment which was refused. The case will have to be considered by the Appellate Court and decided on the materials before it and the Court cannot in very many cases say that the decision of the lower Court on the materials before it is erroneous. As regards review, the scope of Order XLVII is more restricted than that of Order IX. If the plaintiff's evidence is sufficient, then the defendant if he appears will be entitled to let in his evidence in the absence of the plaintiff and it will often be extremely difficult to determine how far reliance ought to be placed on evidence which has not been tested by cross-examination. The provisions of rule 3 are certainly more stringent than the provisions of rule 2 and except in cases where the case has been closed on both sides and the adjournment is only for argument, it is difficult to see how any decision on the materials before the Court can be satisfactory.

If a party is absent and the Judge proceeds to dispose of the case on the merits under rule 3, there can be no review if the Judge does not preside over the Court when the application is made, as rule 2 of Order XLVII limits the power of the successor to grant a review only in cases of discovery of such new and important matter or evidence as is referred to in rule I or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree. It cannot be said that a party who is given time to adduce evidence and who owing to absence is unable to do so has discovered new and important matter or evidence. If owing to absence he is unable to do any other act necessary for the further progress of the suit for which time has been allowed, it is equally a case where no review can be applied for in case the Judge who decided a suit unde Order XVII, rule 3 is not presiding over the Court. The appellate Court in such cases cannot reverse the decree based on the materials before it. It cannot say the Court should have granted an adjournment where the party was absent and did not ask for one and it seems to me that the Appellate Court cannot interfere on the ground that sufficient cause was shown for absence unless it can apply the provisions of Order IX and it cannot do this if rule 3 is held to be the only rule applicable to cases where a decree is passed in the absence of a party to whom time has been given for the doing of an act and the Court

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his absence proceeds to decide the suit "forthwith" on the materials before it. Leaving out of consideration the case of a party who is absent on an adjourned date without sufficient excuse (and who deserves no consideration either under rule 2 or 3,) the application of rule 2 which would give the party the right to set aside the order of dismissal or *ex parte* decree on merely showing that he was prevented from sufficient cause from appearing and to have the whole case reheard on its merits after adducing all the evidence available is more beneficial and wider in scope than an application for review or an appeal which would be the only course available if rule 3 is held applicable to cases of absence.

The scope of Ss. 157 and 158 of the old Code which correspond to rules 2 and 3 of Order XVII of the present Code has been the subject of conflicting decisions. The decision of Wallis and Krishnaswami Aiyar, JJ., in *Chandramathi Ammal* v. *Narayanasami Aiyar* [1], which follows *Shrimant Sagajirao* v. *Smith* [2], is in accordance with the view taken in *Maharaja of Vijayanagaram* v. *Lingam Krishna Bhupati* [3]. It has been followed by Seshagiri Aiyar, J., in *Majeti Nagaratnam* v. *Pachigolla Ramayya* [4], and by Sadasiva Aiyar and Moore, JJ., in *Chenroyan* v. *Rama Chetti* [5]. It supports the view that rules 2 and 3 of Order XVII are independent and mutually exclusive and that where the requisites of rule 2 are satisfied, that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of rule 3.

On the other hand a different view was taken by Munro and Abdur Rahim, JJ., in *Naganada Aiyar* v. *Krishnamurti Aiyar* [6] where it was held that absence of a party on the date of the adjourned hearing does not preclude the Court from dealing with the case under S. 158 (Order XVII rule 3). The earlier decision in *Chandramathi Ammal* v. *Narayanasami Aiyar* [1], has not been considered and the reasons given in that decision have not been met. In *Mariannissa* v. *Ramkalpa Gorain* [7], (Mookerjee and Holmwood, JJ.,) it was held that the scope of S. 157

1. (1909) I. L. R. 33 Mad. 241.
2. (1895) I. L. R. 20 Bom. 736.
3. (1902) 12 M. L. J. 473.
4. (1914) 2 L. W. 105.
5. (1916) 3 L. W. 524.
6. (1910) I. L. R. 34 Mad. p. 97.
7. (1907) I. L. R. 34 Cal. 235.

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was distinct from that of S. 158 but that the Court can act under S. 158 even though the parties are absent if the requirements of S. 158 are otherwise satisfied and the Judge thinks there are materials on record on which it can pronounce judgment. The learned Judges were however of opinion that there was no justification for applying S. 158 to a case to which S. 157 is more appropriately applicable. In *Enatulla Basunia Jiban Mohan Roy* [1], Imam and Chapman, JJ., held that where an adjournment was granted at the instance of a party for the purposes stated in rule 3 and there are materials enabling the Court to decide the suit, it must act under rule 3 and not rule 2. In *Ningappa* v. *Gowdappa* [2], a similar view was taken. The learned Judges thought that S. 102 contemplates that on the record as it stands the plaintiff has not made a case which if unrebutted would entitle him to any relief and that application of S. 158 would be less burdensome to the party, but with all deference I think for the reasons already given that the balance of hardship is the other way in the very great majority of cases that are likely to arise under Ss. 157 and 158. S. 102 contains no such qualification as is indicated and compels the Court to dismiss the suit if plaintiff is absent and defendant does not admit the claim. This decision was followed by Phillips, J., in *Subraminia Othuvar* v. *Munusamiya Pillai* [3], but no reference is made to the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar* [4] nor is there any discussion of the authorities.

I am of opinion that the decision in *Chandramathi Ammal* v. *Narayanasami Aiyar* [4], which, if I may say so with respect, is a well considered judgment dealing fully with the matter, correctly sets out the principle to be applied to cases of absence of either party at the adjourned hearing.

The decision of the question must depend on the express language of Order, XVII, rules 2 and 3. As pointed out in *Chandramathi Ammal* v. *Narayanaswami Aiyar* [4] S. 157 (rule 2) deals with cases of absence of parties and S. 158 (rule 3) with failure to do what was ordered. If the party fails to appear S. 157 (rule 2) applies and there is no reason why the Court should assume (in the absence of any explanation) that he is guilty of default so as to apply the stringent provisions of S.

1. (1914) I. L. R. 41 C. 956.
2. (1905) 7 Bom. L. R. 261.
3. (1915) 31 I. C. 869.
4. (1909) I. L. R. 33 M. 241.

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158 (rule 3). I think the correct rule is to treat rule 3 as applying only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I have already dealt with the matter from the point of view of hardship to the parties and my own experience is that the rule laid down in *Chandramathi Ammal* v. *Narayanaswami Aiyar* [1] has been a safe and uniform guide to Courts. The construction moreover is one that suggests itself on a consideration of the plain language of rules 2 and 3. I have no hesitation in coming to the conclusion that the decision in *Chandramathi Ammal* v. *Narayanaswami Aiyar* [1], ought to be followed.

C. A. S.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE PHILLIPS.

Vellayappa Moothan ... *Appellant** (*Plaintiff*)

*v.*

Krishna Moothan and others ... *Respondents* (*defendants*) *Nos. 2 to 5*).

Vellayappa Moothan v. Krishna Moothan.

*Limitation Act, art. 57, 61, 62, 115 and 120—Suit for recovery of moneys advanced by a partnership consisting of some of the members of a joint Hindu family to the family—Partition suit—Barred debt, if can be claimed.*

Plaintiff and defendants 1 to 3 who were some of the junior members of a joint Hindu family, carried on a partnership trade for their separate benefit, even during the life-time of their common ancestor *P*: who died in 1906. For his funeral expenses, the partnership spent its own moneys. The partnership was dissolved in 1911 and the amount due to the partnership on the above account by the joint family estate fell to the share of the plaintiff among the partners. In a suit for partition in 1913, plaintiff claimed to recover from the first defendant and defendants 2 and 3 (who formed a single branch), ⅜ of this amount, the remaining ⅛ being the amount which he was liable to pay as a member of the joint family.

*Held*, that the cause of action for the partnership to recover the moneys arose on the date of the loan, that the partnership could have sued the joint family for recovery of this debt notwithstanding that some members of the joint family solely constituted the partnership, and that the plaintiff's claim could not be treated as an item of account in the partition suit as it was barred by limitation.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 965 of 1914 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in O. S. No. 41 of 1913.

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* S. A. No. 278 of 1916. 24th August, 1917.

1. (1909) I. L. R. 33 M. 241.

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*P. S. Narayanaswami Aiyar* for *C. V. Anantha Krishna Iyer* for Appellants.

*C. Madhavan Nair*, for Respondents.

The Court delivered the following

**Judgment** :—*Sadasiva Aiyar, J* :—The plaintiff is the appellant and the suit was a suit for partition. The genealogical tree is as follows :

Ponnappa

- Plaintiff
- 1st defendant
- 4th defendant
- Navutti (died 1913)
  - Defendants 2 and 3.

There was a prior suit (O. S. No. 27 of 1906) brought by the 4th defendant which was decreed, but that decree was not executed, as, by a private engagement, his claims were satisfied. Hence the plaintiff sues for $\frac{1}{3}$ share in the properties left (after so satisfying the 4th defendant's claim), the 1st defendant being entitled to another $\frac{1}{3}$ share and defendants 2 and 3 being entitled to the remaining $\frac{1}{3}$ share. This litigation was, however, complicated by the plaintiff claiming (among others) one further relief which arises out of the following facts :—The plaintiff, the 1st defendant, and the 2nd and 3rd defendants alone carried on a partnership trade for their separate benefit. This trade was carried on even during the lifetime of the plaintiff's father Ponnappa and of 2nd and 3rd defendants' father Navutti. Ponnappa died about August 1906. For his funeral expenses, the partnership consisting of the plaintiff, the 1st defendant and the defendants 2 and 3 spent moneys belonging separately to the partnership. When the partnership was dissolved in 1911, the amount alleged on the above account to be due to the partnership by the joint family estate fell to the share of the plaintiff among the partners. The plaintiff claims in this suit to recover from the 1st defendant and the defendants 2 and 3, $\frac{2}{3}$ of this amount which forms item 1 of the D schedule to the plaint, the remaining $\frac{1}{3}$ being due *to himself* (as the assignee from the firm) *by himself* (as one of the three sharers of the joint family). The value of this relief, that is, for recovery of $\frac{2}{3}$ of the debt due by the joint family to the partnership business is Rs. 567-12-7. The lower courts disallowed the plaintiff's claim for this relief as also for a minor relief valued at Rs. 68-5-4 relating to items 2 to 4 of B 1 schedule. This second appeal relates to these two matters, but there is nothing in

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the appeal so far as it relates to items 2 to 4 of B 1 schedule. The second appeal is therefore at once dismissed so far as it relates to that matter.

The ground on which the lower courts disallowed the plaintiff's claim to recover ⅔ of the amounts spent out of the partnership funds for the necessities of the joint family is that the amount was spent so long ago as in 1906 and the claim for its recovery was barred by limitation, the suit having been brought in 1913.

Mr. Narayanaswami Aiyar for the appellant before us contended, (*a*) that the claim was not barred by limitation because the cause of action arose only at the dissolution of the partnership in 1911, (*b*) that, though his claim to recover the shares of the 1st defendant and of the 2nd and 3rd defendants in the money spent may be barred, the plaintiff was entitled, in effecting a partition of the joint family properties, to have allotted to him properties exceeding the value of the shares allotted to the other ⅓ share by the amount due to the partnership by such sharers.

As regards contention (*a*), I do not see how the date of the dissolution of the partnership can give a cause of action against the joint family which cause did not exist before. The right of the members of the partnership firm in the moneys taken out of the firm had nothing to do with the rights and liabilities of the joint Hindu family of which the members did not solely consist of the partners of the firm but included others. Mr. Narayanaswami Aiyar, argued on the basis of the two decisions, in *Rustomji* v. *Sheth Purshotamdas*[1] and *Kashinatha Kedari* v. *Ganesh*[2] that the partnership consisting of the plaintiff, the 1st defendant and the defendants 2 and 3 (four in number) could not have brought a suit against the joint family consisting of the plaintiff, the 1st defendant, the father of the defendants 2 and 3 the defendants 2 and 3 and the 4th defendant, (six in number), because the plaintiffs' four names would also have to appear as the names of four of the six defendants in such a suit and that therefore the only course for the members of the partnership was to have treated the loan as an item to be taken into account in their favour against the other coparceners of the joint family when the joint family members separated from one another.

1. (1901) I. L. R. 25 B. 606. 2. (1902) I. L. R. 26 B. 739.

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In the first place, these two decisions were given in 1901 and 1902 under the old Civil Procedure Code. Jenkins, C. J., says at page 612, (*Rustomji* v. *Sheth Purushotamdas* [1]).' "This is in accordance with the doctrine that where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. In illustration of this, we may refer to *Bosanquet* v. *Wray* [2]."

This doctrine is founded on the elementary rule of procedure too often disregarded in this country, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action." But the learned Judge proceeded to say, "While, however, at Common Law, this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; *for provided all interested were before the court either as plaintiffs or as defendants, they adjusted and determined their rights.* This is aptly exemplified in *Luke* v. *South Kensington Hotel Company* [3]." I think that the reasoning in the above decision does not lead to the result that no suit at all could be brought in which a decision could be arrived at as regards the claim by a firm consisting of A and B as partners against a firm consisting of A and C as partners even under the old Procedure Code. All that seems to have been decided was a matter of procedure that A should not figure both as plaintiff and defendant and that the suit should be so framed as regards parties that this irregularity does not occur while further taking care that all the three partners A, B and C in both firms are made parties to the suit. The proper prayer in such a suit ought to be for the taking of the accounts of both partnerships if necessary, for adjusting the rights of the partners and for the grant of just and equitable reliefs which arise on the facts. Further, I do not think it is allowable to treat a Hindu joint family as of the nature of a partnership firm (the shares and the numbers of the members interested in the family properties not depending upon contractual relations but upon the rules of Hindu law) or to treat the claim of a few of the members (who are

1. (1901) I. L. R. 25 B. 606. 2. (1815) 6 Taunton 597=128 E. R. 1167.
3. (1879) 11 Ch. D. 121.

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members of a separate partnership firm) against the joint family as the claim of one partnership firm against another partnership firm. Even if this could be done, a partnership by lending to the joint family, does possess an immediate cause of action and though the former rule of procedure might not have enabled it to bring a suit in the form of an ordinary suit for recovery of the entire amount of the loan (with the members of the firm ranged as plaintiffs and the same members and the other members of the joint family as defendants), there was nothing to prevent the members of the partnership firm from utilising that cause of action to bring a suit ranging the other members of the family alone as defendants and praying for proper equitable reliefs. Even if any of the articles 57, 61, 62 and 115 of the first Schedule of the Limitation Act, does not apply to such a suit, the residuary article 120 would apply to it and the firm should have brought the suit within 6 years. No such suit within 6 years of 1906 was brought and hence the claim based on the loan of 1906 seems to have been clearly barred in 1913.

Again, if all the 3 members of the firm are treated as managing members of the family, article 107 of the Limitation Act would apply. That article is as follows :—" By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate." This shows that a managing member is entitled to sue for contribution and is not bound to sue for or wait till, partition to get his claim against the joint family adjusted. (In the cases in *Aghorenath Mukhopadhya* v. *Grish Chunder Mukhopadhya* [1], and *Tirupatiraju* v. *Rajagopala Krishnama Raju* [2], the suit was brought after division in the family for contribution in respect of moneys recovered by a creditor from the person who was joint family manager) Again, the new Civil Procedure Code of 1908 (which came into force on 1st January 1909) by O. 30 R. 9 allows a suit by one firm against another notwithstanding that the firms have common partners. Hence, the plaintiff could have brought his suit against the joint family even as an ordinary debt claim (and not for contribution or other equitable relief) on 1-1-1909 and this suit brought in 1913 is barred on this ground also.

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1. (1892) I. L. R. 20 C. 18.

2. (1898) 8 M. L. J. 271.

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Reliance was placed by Mr. Narayanaswami Aiyar on the decision in *Ramdhari Singh* v. *Permanund Singh* [1], and on a passage in Mayne's Hindu Law, S. 470 for his contention that the plaintiff's claim is not barred by limitation. In the case in *Ramdhari Singh* v. *Permanund Singh* [1], the plaintiff and the defendants were joint heirs of one R. S. Singh. The plaintiff was entitled to 1/6th share in the estate of R. S. Singh, the defendants being entitled to 5/6th share. A sum of Rs. 7,700 and odd belonging to the estate was in deposit in a court. The plaintiff sued for recovery of 1/6th of that amount (nearly Rs. 1,300). Defendants (among other defences) claimed to set-off plaintiff's 1/6th share of the expenses incurred by the defendants on the sradh ceremony of one of R. S. Singh's widows. The learned Judges in their judgment (at page 1187) make the following observations on the defendant's claim of set-off: "There remains the second item, the expenses of *sradh*. The learned Judge in one part of his judgment seems to have held that there was no agreement on the part of the plaintiff to pay a share of such expenses, but in another place he says as follows:—"The plaintiff alleges that the amount of cash found was over Rs. 4,000 and certain amounts were allotted for *sradh* and other expenses and only the balance divided. The defendants allege that all that was found was divided and they undertook the *sradh* expenses on the plaintiff agreeing they should recoup themselves from the moneys in deposit, etc. now in suit. All these questions have to be gone into and many others." It seems to us therefore that the learned Judge has not come to any positive finding upon the alleged agreement on the part of the plaintiff to pay a share of the *sradh* expenses. *Besides, apart from any agreement, the plaintiff is liable to contribute his share of the sradh expenses.* The amount, however, which may be found on enquiry into the above matter, cannot be called an "ascertained sum." But the sum need not be "ascertained" in an equitable set-off. * * * We think it inequitable to give a decree to the plaintiff for his share of the assets realised, and drive the defendants to claim against the plaintiff the amount which might have been spent on account of the *sradh*, under an arrangement with the plaintiff, or the reasonable expenses of the *sradh* apart from any agreement, *more specially when a fresh suit may be barred by limitation*, and when the

1. (1915) 19 C. W. N. 1189,

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defendants have paid court-fee upon the whole amount claimed by them." So far as I could see, the learned Judges admit that the claim of the defendants for contribution if made in a suit by the defendants against plaintiff might be barred by limitation and all that they hold is that as defendants, they are entitled to claim a set-off of the contribution due to them by the plaintiff in respect of the *sradh* expenses.

The passage in Mayne's Hindu Law (see page 654, 8th Edn.) is as follows:—"But, of course, advances made *to* any member *for a special private purpose*, for which he would have no right to call upon the family purse, or to discharge his own personal debts, contracted without the authority of the other members, or alienations of the family property made by an individual for his own benefit, would be properly debited against him in estimating his share."

This passage does not directly relate to the question now under consideration. It relates to the converse case where a member of a joint Hindu family as *an individual member* gets an advance of money *from the joint family funds* for his individual-separate benefit, the case before us being one where some members have themselves *made* an advance *to the joint family*. In the former case, the money advanced might be treated as joint family funds in the hands of the person to whom the advance was given which therefore ought to be brought into hotchpot at division. No question of limitation would then arise as regards such property. In the converse case before us, the joint family's *liability* to an individual member or individual members cannot be treated as *assets or property* to be brought into hotchpot at division. I must further remark, as regards the passage in Mayne's Hindu Law, that the authorities quoted in support of the proposition of law laid down in that passage, *viz.*, the decisions in *Konerrav* v. *Gurrao* [1], *Ramanna* v. *Venkata* [2] and *Damodardas Maneklal* v. *Uttamram Maneklal*[3] cannot be said to fully support the said proposition laid down so broadly. I think, that, if the advance was made, say by a father to one of his sons out of the joint family income in the father's hands without any intention to make the son liable to account for the advance at division and without any agreement to that effect between the

1 (1881) I. L. R. 5 B. 589.
2. (1892) I. L. R. 11 M. 246.
3. (1887) I. L. R. 17 B. 271.

father and the son, it may be an act of partiality on the part of the father, but I do not think that, after three years, the joint family or any of the other sons can call the favoured son to account for the advance.

Mr. Narayanaswami Aiyar relied also on certain passages in Freeman on Co-tenancy, Ss. 505 and 512, and contended that, in suits for partition between the co-sharers, courts of equity have got unlimited powers to do justice between the co-sharers. I was at first impressed with this argument, but after the best consideration which I have been able to give to it, I do not think that, where a statute law (in this case, Article 107 of the Limitation Act,) expressly treats a debt due even to the manager of a joint Hindu family as one to be sued for by him just as if he was a complete stranger and, if not, to have his remedy barred, it is permissible (apart from an agreement express or implied) to defeat the intention of the legislature by allowing it to be treated as an item of account or as a debt to be discharged from the joint family funds when partition takes place, it may be, after several years. Of course, the creditor member of the family, whether a manager or a junior member, may, before his debt is barred, take it out of any family moneys which come to his hands before his debt is barred, but he cannot do it after his claim for recovery is barred.

In the result, the second appeal is dismissed with costs.



*Phillips, J.*:—Plaintiff and defendants 1 to 3 as partners of a trading firm defrayed the funeral expenses of plaintiff's father, a member of their family, and after dissolution of partnership, plaintiff alone became entitled to the assets of the firm. In his present suit for partition plaintiff seeks to recover the funeral expenses out of the joint family funds, although admittedly the claim, if treated as a debt, would now be time-barred. Plaintiff pleaded a separate oral agreement under which he is entitled to recover the funeral expenses, but it has been found that this agreement is not true and consequently it cannot be relied on here.

It is first contended that the firm consisting of plaintiffs and defendants 1 to 3 could not have sued the joint family of which they are members, because they would have been bringing a suit against themselves, although in a different capacity. Whatever may have been the Common Law of England on this point, the rule of

Vellayappa Moothan v. Krishna Moothan.

Phillips, J.

procedure, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action, has not been strictly followed by courts of equity as is pointed out by *Jenkins, C. J.*, in *Rustomji* v. *Sheth Purushotam Das* [1], and is certainly not applicable to this country as is shown by the provisions of Order 30, R. 9 of the Code of Civil Procedure, which clearly contemplate suits between the same individuals in different capacities. The trading firm of which plaintiff and defendants 1 to 3, were partners could therefore have sued the joint family of which they were also members. Rule 9 no doubt places some restriction on execution of decrees obtained in suits between firms having one or more partners in common, but we are not now concerned with that question. I hold therefore that plaintiffs and defendants 1 to 3 could have brought a suit for the funeral expenses against their joint family, even if it be assumed that members of a joint family are partners in a firm, and that such a suit is now time-barred. It is then contended that plaintiff can claim the funeral expenses by way of set-off in partitioning the family property, although his right to sue for them as a debt is barred by limitation. The right to set-off, strictly speaking, is confined to a defendant, and if plaintiff makes the claim by way of equitable set-off, it is not very clear how plaintiff who has invoked the aid of the court against defendants, is entitled to any equity as against them. It is urged that he is so entitled because he has a legal right to demand partition. That is quite true, but there is no obligation on him to make such a demand and consequently when he moves the court to enforce his right to a share in the family property against the other defendants he is hardly entitled to claim something more than his share by way of equitable set-off. I therefore agree that the appeal should be dismissed with costs.

A. V. V.

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1. (1901) I. L. R. 25 B. 606 at 612.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

P. L. A. Palaniappa Chettiar ... *Appellant*(Plaintiff).*

*v.*

V.L.A.R. Veerappa Chettiar and others... *Respondents (Defendants.)*

Palaniappa Chettiar *v.* Veerappa Chettiar.

*Limitation Act—S. 13—Effect—Suit against partners of firm—One of the defendants absent from British India for portion of the period of Limitation—Effect—Plaintiff's right to deduction of period (1) as against all defendants (2) at least as against absentee defendant—English Law compared—Partnership—Death of one of the partners—Effect—Legal representative of deceased partner—Position and rights of—Release by one partner—Binding nature on other or others—Conditions—Binding nature on legal representative of deceased partner.*

A, B and C were partners with D in a Firm known as the Epoh Firm. A, B and C were also partners with E in another firm known as the Singapore Firm. D died in 1903, and during the course of the winding up of the Epoh firm, that is, in December 1903, A, B and C lent to the Singapore Firm a certain sum of money. In a suit instituted in November 1909 by F, the son of D, against A, B, C and E for the recovery of plaintiff's share of the money so lent to the Singapore Firm, it appeared that E was not in British India between the end of 1903 and December 1908, though the other defendants were in British India all the time, and that by a *bona fide* deed of composition entered into by the Singapore Firm with its outside creditors, E was, on payment of a certain sum of money to pay off those creditors, released from liability to his partners for any moneys advanced by them.

*Held,* (1) that the absence of E from British India would under S. 13 of the Limitation Act, entitle plaintiff to claim a reduction of time as against E alone and not as against A, B and C also and the fact that plaintiff could have sued A, B and C, who were the co-obligors of E and were within British India during the said period, was not a ground for holding that the claim as against E was barred by Limitation; and

(2) That the release of E was, in the circumstances of the case, binding on plaintiff, his remedy, if he had been damnified by the conduct of A, B and C, being to sue them for damages.

Effect of S. 13 of the Limitation Act in cases in which one of the defendants alone is absent from British India considered and compared with the English Law on the subject.

The legal representative of a deceased partner of a firm is not by implication a partner.

The right of some of the partners of a firm to avoid a fraudulent release of a debt by the other partner or partners and to recover their share of the released debt is personal to them and their legal representatives are not entitled to such a right.

After dissolution by the death of one of the partners, the surviving partners still have the right of releasing a debt to the firm.

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* A. S. No. 134 of 1911. 30th August, 1917.

Palaniappa Chettiar v. Veerappa Chettiar.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad in O. S. No. 72 of 1910.

*M. Patanjali Sastri* (*A. Krishnaswami Aiyar* with him) for the Appellant.

*S. Desikachariar* for the Respondents.

The Court delivered the following

**Judgment**:—The suit was found by the Subordinate Judge to be barred by limitation. The suit loans were taken on 28th December 1903 and 20th January 1904, but the suit was not instituted till 3rd November, 1909.

Appellant's first contention may be briefly disposed of. His Vakil argues that in accordance with a usage of the trading community to which the parties belong, there was an automatic renewal at the end of every 3 months, the accrued interest being added to the principal and the total being treated as a fresh loan. There are entries in Defendant's accounts which might be consistent with such a usage, but no evidence whatever has been adduced to show its actual existence. No such contention appears to have been raised in the lower Court as far as can be seen and in paragraph 14 of his judgment the Subordinate Judge says these quarterly entries were made according to customs merely with a view to record exactly the amount of liability. In the absence of evidence of the usage this plea must be rejected.

It is next urged that these entries in defendant's accounts should be treated as payments of interest within the meaning of S. 20, Indian Limitation Act. This position is equally untenable. Entries in the debtor's account books cannot be treated as payments: Vide *Ichha Dhanji* v. *Natha* [1]. Apppellant relies on *Kariyappa* v. *Rachapa* [2] : but the ruling in that case is clearly against him. There is nothing to show that similar entries were made in plaintiff's own books : and the entries in the books of the debtor firm could in no circumstances be a complete answer to a suit brought by the creditor for recovery of the amount due to him.

The entries are not signed and so cannot be treated as acknowledgments under S. 19 Indian Limitation Act.

The last argument of Mr. Patanjali Sastri on the question of limitation is entitled to far more weight. He argues that as the 1st defendant was not in British India for six years from 1903 to 1908 the plaintiff's cause of action was suspended during that

1. (1888) I. L. R. 13 B 338.    2. (1900) I. L. R. 24 B. 493.

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period under Section 13 of the Limitation Act, not only against the 1st defendant but also against defendants 6 and 8. Before disposing of this question of law, we must deal with a preliminary objection raised by the respondents to its consideration. It was argued on their behalf that this exemption from limitation was not specifically pleaded in the plaint, and that consequently the appellant is not entitled to be heard on it. We asked the learned vakils whether, in view of the fact that the question was considered at length by the Subordinate Judge, there are any grounds for holding that they were prejudiced by the procedure adopted by the lower Court. In answer, we were told that if this point had been mentioned in the plaint and raised in the issue, the defendants could have pleaded that under the Law of Epoh the suit was barred by limitation altogether. We are unable to understand why this plea should not have been put forward even though the exemption under S. 13 of the Indian Limitation Act was not specifically raised in the plaint. Having regard to the fact that the plea of limitation can be disposed of upon the admissions made by the defendant himself, and having also regard to the fact that the question was considered by the Lower Court, we think we should not be justified in refusing to hear the appellant on this point. Before proceeding further we may say that the deposition of the 1st defendant is clear and unambiguous that between 1903 (we shall take the end of 1903) and December 1908 he was not in British India. On this evidence there can be no doubt that if the 1st defendant were the sole defendant, the suit would be in time.

The question argued by the learned Vakil for the appellant has two aspects ;—One is, whether the plaintiff is entitled to claim a reduction of time as against all the defendants by the fact that one of them was absent from British India, and the other, whether the plaintiff is not entitled to deduct the time at least as against the particular defendant who was not resident in India. These questions are not covered by any Indian authority. Mr. Patanjali Sastri drew our attention to some English cases bearing upon the statute of Queen Anne. The language of that statute is not very different from the one we have to construe. In *Fannin* v. *Anderson* [1], Lord Denman, Chief Justice, held that if one of the defendants was absent in a foreign country, the plaintiff was

1. (1845) 7 Q. B. 811=115 E. R. 698.

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entitled to have the period of absence deducted in his favour as against the particular defendant and his co-promisors. This was followed by Jervis, C. J, in *Towns* v. *Mead* [1]. The other learned Judges who sat with him expressed no opinion on the question. These two cases were quoted with approval in *Roddam* v. *Morley* [2]. Prima facie, therefore the extreme contention of the learned Vakil for the appellant would seem to derive support from these decisions; but, on examining them, we are of opinion that the plaintiff is not entitled to deduct the time of absence of the 1st defendant as against the other defendants. Mr. Shephard in his Commentary on the Indian Limitation Act points out that under the English Law if a co-obligor who is within the jurisdiction is sued, it is open to him to demur to the trial of the action on the ground that the other co-obligors should also be proceeded with at the same trial. Reference may be made in this connection to the well-known case of *King* v. *Hoare* [3]. Having regard to S. 43 of the Indian Contract Act which declares that co-promisors are jointly and severally liable such a plea will not be available in India. Secondly, it is stated in *Fannin* v. *Anderson* [4], " The plaintiff cannot bring the absent defendants into court by any act of his : and, therefore, if he be compelled to sue those who are within six years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent :" That again is not the rule of law which obtains in this country. See *Muhammad Askari* v. *Radhe Ram Singh* [5] and *Mool Chand* v. *Alwar Chetty* [6]. It is doubtful whether the principle mentioned by *Lord Denman, Chief Justice,* is good law now even in England. See Bullen and Leakes' Precedents of Pleadings note (A) at page 614 and Leake on Contracts, page 684 (6th Edn). In this treatise, the law is stated in these terms ; "A judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others; but if the obligors are bound jointly and severally the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part

1. (1856) 16 Common Bench 134=139 E. R. 711.
2. (1857) 1 De. G and J. 11=44 E. R. 622.
3. (1849) 13 M & W. 494=153 E. R. 206.
4. (1845) 7 Q. B. 811=115 E R. 693.
5. (1900) I. L. R. 22 A 307.
6. (1915) I. L. R. 39 M 548.

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of the debt remains due." A third ground upon which the English decisions proceed is pointed out in Darby and Bosanquet on Limitation and that is that the principle of the cases decided under the Statute of James which applies to one of several plaintiffs residing abroad should govern the construction of the statute of Queen Anne as well. None of the above special grounds are applicable to India. Moreover the language of S. 13 of the Limitation Act does not lend itself to the extreme contention of the appellant. Although the singular 'defendant' would include the plural 'defendants' the contention would necessitate our reading into the section some words like these, namely, "If there are more defendants than one and any one of them happens to be out of British India." We see no reason for adopting such a construction. We must therefore hold that the absence of the 1st defendant would not entitle the plaintiff to count the period of his absence in his favour as against defendants 6 and 8.

On the other hand we think that the alternative contention of the learned Vakil for the appellant is well founded. As we stated already, under S. 43 of the Indian Contract Act the liability of co-promisors is joint and several. S 249 of the Contract Act enunciates the same principle as regards partners. Consequently the plaintiff could sue for the whole of the amount the 1st defendant alone; and he would be entitled under S. 13 of the Limitation Act to deduct the time during which the latter was absent from British India. The fact that in the suit thus brought, the plaintiff has impleaded defendants 6 and 8 is no ground for rejecting the claim as against the 1st defendant also. No violence will be done to the language of S. 13 of the Limitation Act by holding that as against the absentee defendant alone the plaintiff is entitled to the deduction of time during which he was away from British India. The fact that he could have sued his co-obligors who were within British India is not a ground for holding that the claim against the 1st defendant is barred by limitation See *Abdulkhadir* v. *Ahammad Shaiwa Ravuthar* [1]. We must therefore hold that the appeal, so far as defendants 6 and 8 are concerned fails and must be dismissed. The appeal also fails as against defendants 3, 4, 5, 7, 9 and 10 who are members of a joint family with defendants 6 and 8. We must now proceed to hear the appeal against the defendants 1 and 2 on the merits.

1. (1913) I. L. R. 38 M. 419.

Balaniappa Chettiar v. Veerappa Chettiar.

*A. Krishnaswami Aiyar* and *Patanjali Sastri* for Appellant.

*K. V. Krishnaswami Aiyar* and *S. Desikachariar* for Respondents.

This appeal as against Respondents 1 and 2 coming for on hearing on Friday the 17th day of August 1917 and this day, the Court delivered the following

**Judgment** :—On the second question argued by Mr. A. Krishnaswami Aiyar, the facts are these :—The father of the plaintiff was a partner with defendants 3, 6 and 8 in the Epoh Firm, which we shall denominate as the Creditor Firm. Defendants 3, 6 and 8 were also partners with the 1st defendant in the Singapore Firm which we shall call the Debtor Firm. The plaintiff's father died in 1903. During the course of the winding up of the Creditor Firm, Defendants 3, 6 and 8 lent to the Debtor Firm a certain sum of money. The present suit is to recover the plaintiff's share of that loan. The question whether the plaintiff can maintain the suit against a firm which consists of some of his own partners need not be decided as we agree with the Lower Court upon another point.

By Exhibit I, the debtor firm entered into a deed of composition with the outside creditors of that Firm. The main provisions of that document are that the 1st defendant should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. The arrangement come to appears to us to have been *bona fide* and reflects credit on the partners in that they agreed to forego their own rights with a view to pay off those who had lent moneys to the firm. We are unable to agree with Mr. A. Krishnaswami Aiyar that by such an understanding, defendants 3, 6 and 8, secured any personal advantage to themselves. We agree that moral turpitude need not be brought home to them (see *Nocton* v. *Lord Ashburn* [1]), but we think that the arrangement was a business-like one and was entered into for the purpose of securing the best interests of the Debtor Firm. The question, under these circumstances, is whether the release of the 1st defendant is impeachable by the plaintiff. That one partner can release a partnership liability is well established. See Lindley, page 180. That after dissolution by the death of one of the partners, the surviving partners, still have the right of releasing

1. (1914) A. C. 932.

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a claim is clear from S. 263 of the Contract Act. Vide also *Motilal Bechardoss* v. *Chellabai Hariram* 1.

Mr. A. Krishnaswami Aiyar put forward the ingenious argument that after the death of one of the partners, his legal representative continues to be a partner for the purpose of winding up. We are unable to accede to this proposition. Under Sec. 241, the legal representative of a deceased partner will become a lender in respect of any business that might have been carried on by the surviving partners. If no business is carried on then the legal representative will be a tenant in common with the surviving partners in respect of the assets of the business. *Vide* Story on Partnership, S. 346. That the principle of S. 45 of the Contract Act is applicable to partners was decided in *Moti Lal Bechardass* v. *Ghellabai Hariram*[1] and we agree with this proposition. The argument that by Sec. 263 of the Contract Act, the legal representative of a deceased partner is by implication a partner is opposed to the language of the section. Clause 2 of S. 29 of the English Partnership Act was relied on. That only shows that if during the winding up, the partner makes a secret profit, he is accountable to the legal representatives of the deceased partner for it. That section is no authority for the position contended for by the learned Vakil. *Piercy* v. *Fynney* [2], *Viraswami Naicker* v. *Ibramsa Ravuthar* [3] and *Baikunt Nath Chakrabarti* v. *Hara Lal Pal Chowdhury* [4], lay down that if a release by one of the partners is fraudulent, the other partners can avoid it and seek to recover their share of the released debt, The legal representative is not entitled to such a right which is personal to the partners. We are therefore of opinion that the release of the 1st defendant is binding on the plaintiff. If he has been damnified by the conduct of defendants 3, 6 and 8 his remedy is to sue them for damages. As we have held that the claim against the defendants 3, 6 and 8 is barred by limitation, this matter need not be pursued any further.

The decision of the court below is right and we dismiss the appeal with the costs of defendants 1 and 2.

A. S. V.

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1. (1892) I. L. R. 17 B 6 at p. 13.
2. (1871) 12 Equity cases 69.
3. (1909) 19 M. L. J. 221.
4. (1911) 13 C. L. J. 234

## PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the Court of the Judicial Commissioner of Sind.]

H. H. Mir Abdul Hussein Khan ... *Plaintiff * Appellant*

*v.*

Mussammat Bibi Sona Dero and another ... *Defendants-Respondents.*

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Mir Abdul Hussain Khan v. Mussammat Bibi Sona Dero.

*Custom, proof of—burden of proof where custom set up—Alleged presumption in favour of custom—Bombay Regulation IV of 1827, S. 26—Punjab Laws Act, 1872 (Act IV of 1872) S. 5.—Family customs, recognised in India—Requisites to legal recognition of custom—Antiquity and certainty—Instances adduced in proof of custom—May be useful even though all the requisite conditions are not proved in every case.*

When either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply.

No presumption in favour of custom as against the general or personal law is created by clauses such as S. 26 of Bombay Regulation IV of 1827 or S. 5 of the Punjab Laws Act: it is only when the custom is proved that it is made the rule of decision.

Mr. Justice Robertson's judgment in *Daya Ram v. Sohel Singh and others* [1] approved.

Custom binding inheritance in a particular family, although foreign to the spirit of English law, is recognised in India; and if the custom is well established in one particular family, the fact that it might or might not apply to other families will not make it void for uncertainty.

Special usages modifying the ordinary law of succession must be (1.) ancient (2) invariable (3) established to be so by clear and unambiguous evidence

Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

The best evidence as to custom of inheritance is generally found in connection with the division of land, and Revenue Records may therefore be of great value.

Appeal from a decree of the Court of the Judicial Commissioner of Sind, dated January 9, 1912, reversing a decree of the Judicial Commissioner (District Court Jurisdiction).

The facts of the case are sufficiently stated in their Lordships' judgment. The suit was for the property of an intestate, and the only questions for determination were (1)

* 2, 3, 5, 6, 9, 10 and 12. July 1917.

1. (1906) 41 P. R. 390 at p. 410 (F. B)

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whether deceased was a Shia or a Sunni (2) whether there was a custom in his family excluding daughters and their issue in favour of male agnates. If such custom were established plaintiff would get the whole, whether deceased were Shia or Sunni: while if deceased were held to be a Sunni he would anyhow get half. Both Courts held deceased was a Shia: but the first Court held the custom proved, and therefore decreed the suit, while the Appellate Court found the custom not proved and dismissed the claim. Hence this appeal.

*P. O. Lawrence, K. C.*, for appellant:—The trial Judge held deceased was a Shia, and the Appellate Court confirmed this finding. We say this does not conclude the case, for we take the point that the question is not what sect deceased belonged to, but whether he adopted the Shia rule of succession. But we mainly rely on the custom, which was held to be proved by the local Judge after a trial extending over six months, during which he saw most of the witnesses.

The plaint was originally filed in the Court of the District Judge of Hyderabad, who returned it for presentation to the proper Court. A new plaint was then filed in the Court of the First Class Subordinate Judge of Hyderabad, whence it was later on transferred to the District Court and tried by one of the Judicial Commissioners under his District Court jurisdiction. In this fresh plaint the suit was based upon "the custom regulating the inheritance by females in the family of the parties, and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable and has been acted upon from time immemorial". The words "and amongst the respectable Baluchis and Sardars" were inserted owing to *Pranjivan Dayaram* v. *Bai Reva* [1]. They gave trouble in the Appellate Court, where the Judges held they made the custom pleaded too vague and declined to allow amendment.

(*Lord Buckmaster*:—In effect it was pleading evidence.

*Sir W. Phillimore*:—Could you have pleaded altenativley?)

No: this family is not included among the Baluchis and Sardars. The custom is sufficiently exact. The phrase about respectable Baluchis and Sardars is surplusage. The real issue

1. (1881) I. L. R. 5 B. 482.

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was whether the custom prevailed in the family. The fact that an indefinite class was added is irrelevant. If the only custom pleaded had been one prevailing among respectable Baluchis and Sardars, I admit it would be too vague. If the amendment which was refused us had been applied for before trial it would have been granted as a matter of course.

(*Lord Buckmaster* :—What is the custom you allege? It is important, because the custom has to be *exact*. You cannot collect from a number of instances something which may help you.)

Our plaint states it thus : "a woman is entitled to her proper dowry according to the rank and status of the family, and she has no other rights of inheritance to the property of her paternal relations".

(*Lord Buckmaster* :—What is dowry here?)

Her portion.

(*Mr. Ameer Ali* :—In Mahomedan law it means what the husband gives.)

It has a different meaning here : it is what her own family gives. The trial Judge found that "in the family of the Mirs descended from Mir Kaku Khan there is a well established custom having the force of law by which daughters and female paternal relations of the deceased are excluded from inheritance by any male agnate".

(*Lord Buckmaster* :—What you allege is "no woman can inherit". That is a very simple and plain custom.)

We have proved 58 instances in which the custom was upheld.

(*Sir W. Phillimore* :—Are our rules about custom prevalent in India? There can be no Richard I there.)

If you prove the origin of a custom you go far to defeat yourself. In India the books are full of customs which would not be tolerated in England.

(*Sir W. Phillimore* :—I can't think of any family custom in England.

(*Lord Buckmaster* :—If you prove a custom based on violence and force, you invalidate it. You need not prove origin. Here your witnesses did attempt to prove it.)

The Appellate Court have gone into the question of origin, and have held that if the origin we suggested were the real one,

the custom is founded "not on legal reason but on violence and oppression and is therefore unreasonable". "Not a single woman", they say, "has been called in support of the custom and this coupled with the fact that the women affected are purdah-nishin women, raises a strong presumption that the practice if it exists is founded as said in *Tyson* v. *Smith* [1] "in wrong and usurpation and not on the voluntary consent of the people to whom it relates". The defendants made no attempt to prove that the custom or the numerous instances of it proved were accounted for by violence or oppression; they could have called women if they had wanted to; not even the first defendant herself was examined. Violence and oppression should be proved, not merely suggested. If you proceed on theory only, all the customs in the Punjab excluding women might be said to be founded on oppression.

(*Sir Walter Phillimore*:—Or our Common Law.

*Mr. Ameer Ali*:—The difference is that the personal law of Mahomedans gives women rights. Surely women could give evidence that they knew of the custom and therefore did not claim.)

The first defendant's own son has given evidence of two cases where she suffered by the custom. Neither side has called women, and no comment was made on their being left out either by the parties themselves or by the trial Judge.

In *Tyson v. Smith* [1], the custom was upheld. Chief Justice Tindal's judgment in that case (pp. 419, 422,) dealt with the English notion of custom, which is quite different from that in the Punjab and elsewhere in India. There is no plea and no issue on this point, whether the custom is reasonable or not. Even the Appellate Court here was not prepared to hold that a custom excluding females from paternal inheritance is in law unreasonable. I submit the custom here is reasonable in this sense, that it approximates to numberless other cases where women have been excluded.

*Lord Buckmaster*:—The whole discussion arose out of your attempting to prove origin: it only shows how bad it may turn out to bring in things which are not relevant.)

1. (1838) 9 Ad. & El. 406=112 E. R. 1265.

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Counsel then proceeded to deal at great length with the 58 instances adduced in proof of the custom.

(*Lord Buckmaster*:—These people seldom if ever follow the law: they settle amongst themselves as to the division of the property: one effect is that it is sons by males and never the women who inherit. But is that a custom ?)

It is surely noteworthy that the sons take *equally* among themselves, and that the women get nothing at all.

Evidence showing the prevalence of a custom among families having a common origin has been admitted in support of a custom. *Mohesh Chunder Dhal* v. *Satrughan Dhal* [1], *Pranjivan Dayaram* v. *Bai Reva* [2].

*Colonel Arthur Grey* followed:—Once it is held that parties are governed by customary law, the presumption is in favour of custom as against any personal law, and it is only where custom fails that resort can be had to the personal law. *Daya Ram* v. *Sohel Singh* [3].

The case cited is under the Punjab Laws Act, but the law applicable here (S. 26 of Bombay Regulation IV of 1827; which has by notice been extended to Sind) is precisely similar.

(*Lord Buckmaster*.—In *Daya Ram* v. *Sohel Singh* [3] the custom was ascertained and admitted, the only point was whether it applied).

I cite it to show that in these parts the people are bound by Customary Law.

(*Sir W. Phillimore*:— Is this a case of Customary Law, against Common Law, or of one custom against another custom ?)

When a custom is proved it becomes the general or common law of the part to which the proved custom extends. These parties are Baluchis and their origin is doubtful. The presumption is that the custom was in force before their conversion to Islam, not that it has grown up since then. The Talpur Mirs have an extraordinary position and this is the only case in the history of the tribe in which the custom alleged has been disputed.

(*Lord Buckmaster*:—When a custom is set up and is found not to extend to the case, the Court, as in *Daya Ram* v. *Sohel Singh* [3] can do nothing except apply the personal law, and find out what is proved as to custom modifying it.)

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1. (1902) L. R. 29 I. A. 62: I.L.R. 29 C. 343. 2. (1881) I. L. R. 5 B. 482, 489.
3. (1906) 41 Punj. Rec. 390 (F. B.)

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Reference was also made to *Ramalakshmi Ammal* v. *Perumal* [1], *Sundaralingasami* v. *Ramasami*, [2] Mayne's Hindu Law, paragraph 50.

*De Gruyther, K. C., for respondents* :—The general law applicable to all Mahomedans in India is the Mahomedan Law: 21 Geo. 3, c. 70, S. 17. To displace that personal law strong evidence is required. It is quite common to find instances where Mahomedan ladies do not claim their rights, but this is far from proving that they have not got such rights. *Mirabivi* v. *Vellayamma* [3].

The history of this particular family is to be found in the Imperial Gazetteer of Sind, Vol. 22, pp. 397 et seq. The Court may refer to it under S. 57 of the Indian Evidence Act. As to the authorities to which reference can be made in such matters, see also *Read* v. *Bishop of Lincoln*, [4]. S. 87 of the Indian Evidence Act enumerates the presumptions which may be made as to such books: presumably this Gazetteer was published under the authority of Government.

The Revenue Records are of great importance in the case. They show all the people who have held the various estates. There is nothing in the register produced to show that appellant's witnesses as members of the family ever owned what they claim here. The omission to produce records shows that there was no land owned by the appellant's family.

[*Grey* :—The records give the names of members of the family as holding land. That was brought out in examination in chief and there was no cross-examination on the point, so it was taken that the evidence was unchallenged and not liable to be disputed.]

*Sir W. Phillimore* :—These persons were not claiming title. They were merely giving evidence of a custom.

Counsel then went at length into the evidence and submitted that the custom was not established.

There is no force in the contention that the rule as to custom laid down by this Board in *Ramalakshmi Ammal* v. *Perumal* [1], does not apply to the Punjab and Sind. It still remains law that whoever sets up a custom must prove it. This was clearly

1. (1872) 14 M. I. A. 570. 2. (1899) L. R. 26 I. A. 55=I. L. R. 22 M. 515.
3. (1885) I. L. R. 8 Mad. 464. 4. L. R. (1892) A. C. 644.

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recognised in the *Memon case—Mahomed Sidick* v. *Haji Ahmed* [1],

*Grey* replied

Their Lordships' judgment was delivered (October 30, 1917) by

*Lord Buckmaster.*—On the 30th January, 1907, Mir Hussein Ali Khan of Talpur died intestate, leaving neither widow nor child. His nearest surviving relations were the plaintiff, Abdul Hussein, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting exclusively of personal property, and largely of what we would call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations. It is a dispute about the inheritance of this property that has given rise to the present appeal. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mahommedan, and, if Mahommedan law governed the question, the rights of the parties would vary accordingly whether the deceased was a member of Shia or of the Sunni sect. If the former, the sister would inherit the whole estate; if the latter, the plaintiff would be entitled to a half. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mahommedan law, but that they are regulated by a custom well known and distinctly ascertained, by which, notwithstanding the provisions of the Koran, women are excluded from any share in the inheritance of a paternal relation. He further alleges that, if this contention does not prevail, the deceased was a Sunni and not a Shia, and that he is therefore entitled to the more limited rights to which reference has been made. Their Lordships think it is convenient to dispose of the latter contention first.

Although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the Sunni and the Shia, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive, both the Judicial Commissioner, before

1. (1885) I. L. R. 10 B. 1 at p. 9.

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whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind, before whom the appeal was heard, have decided that the deceased was of the Shia persuasion, and with this finding their Lordships see no reason to interfere.

There remains therefore for consideration only the question of custom, and upon this the Court of First Instance and the Court of Appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds.

Before proceeding to investigate the facts and circumstances that have influenced the two judgments already mentioned, it is desirable to make plain what is the position of a person like the plaintiff, who asserts that custom and not Mahommedan law gives him the rights he claims. The appellant alleges that, by Section 26 of the Bombay Regulation of 1827, which has by notice been extended to the District of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He bases this argument upon the words of the Regulation, which are as follows: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."

Their Lordships cannot accept this view. In the case of *Daya Ram* v. *Sohel Singh and others*[1] which related to proof of a Hindu custom, the Chief Court of the Punjab had to consider a similar question on the terms of Section 5 of the Punjab Laws Act, the words of which are more strictly in favour of the appellant's contention than those of the Regulation that governs this dispute. This contention was dealt with by Mr. Justice Robertson at p. 410 of the report in words which their Lordships think so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. The learned Judge said:—

1. (1906) 41 Punjab Record p. 390.

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"In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so clause (*b*) of Section 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

The principle that underlies this statement is, in their Lordships' opinion, correct, and is applicable to the construction of the Regulation that governs the present case. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognised in India (see *Soorendranath Roy* v. *Mussamut Heeramonee Burmoneah*, [1] although such a custom is unknown to the law of this country and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed

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1 (1868) 12 M. I. A., 81, 91.

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here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or not by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Nor are their Lordships prepared to accept without qualification the statement of Mr. Justice Crouch that it is necessary to reject as useless for proving the custom "all those instances where we have no evidence that the deceased left any estate at all, or where there is no evidence to show its nature or value, or the amount of liabilities against it, *e. g.*, whether or not it consisted merely of a Jagir, or *Mafi* land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; where there is no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; where, in case of a married lady, we have no evidence showing the actual amount of dowry received; where, in case of unmarried ladies, there is no proof that they knew of the custom and stood aside in obedience to it. And in all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and, with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusions." An example of each of the conditions there laid down ought certainly to be established by some witness, but it is not, in their Lordships' opinion, necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight is due.

But, as pointed out by this Board in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* [1]; "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the

1. (1872) 14 M. I. A. p. 585.

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conditions of antiquity and certainty on which alone their legal title to recognition depends."

It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down. It is urged against the appellant that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on the 12th July, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on the 10th July, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side)"; and finally in the plaint in the present proceedings, where the custom is asserted in these terms: "But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst Sunnis or Shias alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals, and the question is, was such a custom proved?

A very large number of witnesses were called in its support, and a number of instances, amounting to sixty-one in all, were given as evidence of its operation. This evidence has been the subject of the most painstaking and careful analysis by both the Courts, and has again been carefully considered by their Lordships with the assistance of the criticisms made, both in the District Court and in the Court of Appeal. Upon the whole their Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the High Court must be accepted. Their Lordships do not propose to examine again in detail each one of the instances mentioned, for

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there are one or two general observations which are, in their opinion, sufficient.

The custom alleged, in its form most limited and best suited to the plaintiff's case, is a custom confined to the Talpur Mirs, the descendants of one Kaku Khan. These descendants are now represented by eight different families, viz.: Sorabanis, Rustomines, Bijranies, Shahdanis, Mahomedanis, Shahwanis, Jamanis, and Manikanis, of which the deceased belonged to the Shahdanis. Relevant and material instances are to be extracted from the descent of these families. The attempt to extend the custom to the "respectable Baluchis and Sardars" broke down, and it would in their Lordships opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Baluchis and Sardars." Dealing, therefore, with the Talpur Mirs alone, their Lordships think the evidence is subject to the following comments :—

In the first place, many of the instances relate to descendants of a ruling family and depend upon the eldest son inheriting to the exclusion of his brothers and sisters. Although it is true that the sisters are excluded, yet it is plain that we have not in these cases reached the custom on which the plaintiff relies, because in a ruling family an over-riding custom has excluded all males as well as females in favour of the eldest male. Nine further cases relate to instances where the excluded daughters were unmarried and living with their brothers. These instances cannot be confidently relied upon. The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they relate do not exist or whether they are put on one side because, in the circumstances, there is no need that they should be asserted. This is pointed out in the case of *Mirabivi and another* v. *Vellayanna and others*, [1] by Chief Justice Turner and Mr. Justice Hutchins. It is there stated at p. 465 :—

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been alloted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Mahommedan law. There are also cases in

1. (1885) I. L. R., 8 M. p. 464.

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which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahommedan law. Indeed, in many parts of the country it is unusual for Mahommedan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mahommedan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much."

And with this statement their Lordships are in entire agreement.

In certain other instances, and notably in 24, 35, and 45, there is no substantial evidence of property to be divided, and in the most recent cases of all, 52-60, there is only one witness who speaks in their support, although it is plain that there must have been others who could have spoken upon the matter. It ought not, of course, to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon; nor again, because in certain respects some of the witnesses may be found untrustworthy.

But there is one outstanding circumstance in the present case which their Lordships think demands attention. Mir Rustom Khan is the admitted head of the Rustomanis. He is a man of position and authority, and he says in plain terms that "there is no such custom amongst our families by which daughters and sisters are excluded from inheritance. They get their share of inheritance according to Mahommedan law."

He is supported by other witnesses, of whom the learned Trial Judge says that they are all witnesses of high position, and that there seems no special reason why they should combine to give false evidence on behalf of the defendants, although he adds that Mir Rustom Khan was not on good terms with the plaintiff, and inclined to exaggerate his evidence. But the learned Judge declines to accept the view that these important witnesses are committing perjury, and the statement which he thinks shows a tendency to

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bias in favour of the defence is a statement which may well have been misunderstood. Mir Rustom Khan was speaking of the religion of the deceased, and stated that whenever a Sunni entered his house he had it washed three times. As the servants were Sunnis the learned Judge thinks that this is a clear improbability. It appears to their Lordships quite possible that Mir Rustom Khan was only referring to people of a similar social standing to the deceased, who, it is not unreasonable to assume would not pay the same attention to the religion of his servants that he might to the religion of his friends. But however this may be, Rustom Khan can have been under no misapprehension upon the question of this custom. If he did not know of it it may be safe to say that it did not exist. If he did know of it he could not have denied the knowledge without deliberate untruth, which there is no reason to impute to his evidence.

There is, however, one instance in connection with his testimony which does need some further consideration. Mir Validad Khan, who was the paternal uncle of Rustom Khan, died leaving three sons and six daughters. Mir Rustom Khan was asked to determine how the estate should be divided among the three sons, and he made an award, effecting this division. It is suggested that if no such custom as that alleged existed he must have known that he was making an improper division of the property. Their Lordships do not think this is the only and necessary inference. He was never asked to determine the rights as between the brothers and the sisters, but merely how to divide the property among the brothers themselves, and it may well be that he assumed that arrangements had been made with the sisters which rendered it unnecessary for him to consider anything more than the actual point that he was called upon to determine. He also speaks to a matter, to which constant reference is made by the witnesses, and that is that the question of inheritance is decided in each family, either by a family council or by the head of the family. This is an extremely probable explanation of many of the instances in the present case, and if it be accepted it destroys the custom, because the division made according to the wishes of the members of a family council is certainly not the custom on which the plaintiff relies.

In every case of this kind the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a

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number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.

There is also another piece of evidence which is of considerable value: this is to be found in the Revenue Records which relate to the descent of the property of Mir Ghulam Ali Khan, who died leaving three widows, one sister, two daughters, and a brother; one of these Records, dated October, 1903, shows a clear division according to the Mahommedan law, and not according to any such custom as is alleged. There are no other Revenue Records produced, and it is said that the reason of their non-production is that they do not assist the defendants' case. But their Lordships think the omission is serious. The best evidence associated with any such custom as that alleged would be found in connection with the division of land, and these records would at least have established the fact that land was left, its extent and character, and would, were it the fact, make clear the point which the evidence leaves uncertain, that, in the division of this property, the women were excluded.

The argument put forward by the defendant that, in many of the cited instances, the women said to have been excluded have been provided with dowries either in the lifetime of the owner of the estate, on the division of which they received no benefit, or after his death by a male relation, and that this was equivalent to and must be taken as a recognition of their right to share, is one to which their Lordships are unable to accede. It is quite possible that the husband of a wife who had been suitably dowered would not desire to claim rights of inheritance against those by whose generosity or at whose expense the dower had been provided, but this would not involve the conclusion that the right to share existed and had been satisfied by the dower.

Again, such an argument, though it might affect inheritance as between father and daughter, would not cover the present case, for if a daughter had been dowered by her father, and this were treated as equivalent to an advancement of her share in his estate, this would not affect a claim like the present put forward by a woman to a share in her brother's estate by whom she had never been dowered at all.

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that,

although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahommedan law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

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Solicitor for Appellant:—*E. Dalgado.*

Solicitors for Respondents:—*Wontner & Sons.*

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## PRIVY COUNCIL.

PRESENT:—LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Madras.]

Krishnasami Panikondar ... *Appellant**

*v*

S. R. M. A. R. Ramasami Chetty and others ... *Respondents.*

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*Limitation—Admission of appeal after period of limitation without notice to respondent—Open to reconsideration at instance of respondent—Practice of Indian Courts—Stage at which question of limitation should be finally decided—Directions of the Privy Council—Indian Limitation Act,* 1908 *(Act IX of* 1908) *Ss.* 4, 5.

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made ex parte, it is open to reconsideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal, although this may have hitherto been the usage in India. The Courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal.

Appeal from an order of the Madras High Court, dated November 4, 1908, dismissing an appeal against a decree of the Subordinate Judge of Tanjore.

The facts of the case are sufficiently stated in their Lordships' judgment. The main question was whether the High Court at the hearing of the Appeal had power to go behind an ex-parte order admitting it.

*Sir Erle Richards, K.C.,* and *Kenworthy Brown* for Appellant.

*DeGruyther, K.C.,* and *O'Gorman* for Respondents.

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* October 16, 17 and 18 and Nov, 8 1917.

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*Sir Erle Richards, K.C.*, for appellant:—The order admitting the appeal was made on July 31, 1905. Although notice of the admission was given to respondent, he only applied to set it aside on September 28, 1908. I submit that his application was barred by limitation and should have been dismissed.

There is no inherent power in a Court to reverse a decision: it depends upon the Civil Procedure Code: practice is not enough.

The admission order was made under Rule 1 (*b*) of the Madras High Court Rules, which came into force in January 1905. Under these rules the Judges may hear *and determine* an application to admit an appeal beyond time. A single Judge has power to admit.

The respondent's only remedy against the admission was by applying for review under S. 623 of the Civil Procedure Code, and to do this he was bound by time. The practice in Madras since the case of *Venkatrayadu* v. *Nagadu* [1], has been against me, but such practice cannot override the Civil Procedure Code. The application for review should have been made to the same tribunal. The two Judges who heard the appeal had no power to set aside Mr. Justice Sankaran Nair's decision: it was not an order, for it was a determination of the point.

In 1867 this question came before the Calcutta High Court and it was held by the majority that when an appeal had been admitted and notice given to the respondent the appellate Court had no power at the hearing to reject the appeal as out of time. *Bharat Chunder Roy* v. *Issur Chunder Sircar* [2]. I rely on the judgment of Sir Barnes Peacock in that case. A different view was taken by a majority of the Allahabad High Court in *Dube Sahai* v. *Ganeshi Lal* [3], but there is a later case in my favour, *Jhotee Sahoo* v. *Omesh Chunder Sircar* [4], while *Bhismadeo* v. *Sitanath* [5], is suggested against me.

Counsel then proceeded to deal with the merits as to the delay, when *De Gruyther, K.C.*, objected that no other ground than that already argued had been urged in applying for special leave. He referred to *Corporation of St. John's* v. *Central Vermont Railway Co.* [6], but said he would not press the objection.

1. (1886) I.L.R. 9 Mad. 450.
2. (1867) 8 W. R. 141.
3. (1878) I.L.R. 1 All: 35 (F. B.).
4. (1879) I.L.R. 5 Calc. 1.
5. (1913) 17 Cal. W. N. 42.
6. (1889) L.R. 14 A. C. 590.

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*Kenworthy Brown followed*:—Even though Sankaran Nair, J. may have been wrong in not adding to his order the words "Subject to objection at the hearing" still he has made an order and he had jurisdiction to make it and his order stands good.

Respondents' Counsel were not called on.

Their Lordships' judgment was delivered (November 8, 1917) by

Sir Lawrence Jenkins.

*Sir Lawrence Jenkins.*—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits

The original decree was passed on the 8th February 1905 in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the Court reopened after vacation; but it was not presented until the 12th July, 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the Court that he had sufficient cause for not presenting his appeal within the prescribed period.

He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before Sankara Nair, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the Court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The Court, after an examination of the several

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affidavits, accepted this view and dismissed the appeal, as provided by Section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by Sankaran Nair, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to re-consideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

But there remains the contention that, at any rate, the Court exceeded its jurisdiction in permitting the question of limitation to be reopened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an afterthought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bashyam Aiyangar; nor was it even mentioned in the original review petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the Court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission,

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the final determination (after due notice to all parties), of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in S. 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The Court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the Court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for Appellant :—*Douglas Grant.*

Solicitors for Respondents :—*Chapman, Walker & Shephard.*

A. P. P.

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## PRIVY COUNCIL.

PRESENT :—LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Saudagar Singh ... *Defendant-Appellant**

*v.*

Pardip Narayan Singh and others ... *Plaintiffs-Respondents.*

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Saudagar Singh v. Pardip Narayan Singh.

*Declaratory decree—Alienation by Hindu widow—Presumptive heir—Declaration to protect his interests, whether permissible—Specific Relief Act, 1877 (Act I of 1877) S. 42, Illustration (e).*

When a deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed.

*Janaki Ammal v. Narayanasami Aiyer*[1], *distinguished.*

Appeal against a decree of the Calcutta High Court, dated January 29, 1914, reversing a decree of the Subordinate Judge of Patna.

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* October 19, 1917.

1. (1916) L.R. 43 I.A. 207=31 M. L. J. 225=39 M. 684.

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Saudagar Singh. v. Pardip Narayan Singh.

The parties to the litigation were governed by the Mitakshara. Deo Narayan Singh, who had separated from the joint family into which he was born, died leaving a widow Jaibasi Koer (defendant No. 1), and a childless widowed daughter Sakhalbuti Koer (defendant No. 2). After Deo Narayan Singh's death these two ladies by a Tamliknama or deed of assignment, which was voluntary, purported to convey the whole estate of Deo Narayan absolutely to the defendant appellant Saudagar Singh, who was son of one of Deo Narayan's uncles. The Tamliknama recited that appellant was the sole next reversioner. Appellant took possession thereunder. Thereafter respondents, who were the three sons of another uncle of Deo Narayan, sued the parties to the deed for a declaration that the ladies had no right to execute the Tamliknama and that the assignee acquired no title thereunder and that the deed was ineffective and inoperative as against the plaintiffs. They also claimed possession and other reliefs, but abandoned these claims before the High Court.

Defendants contended inter alia that Saudagar Singh was the only next reversioner, as plaintiffs' father was only the half brother of Deo Narayan. The trial Judge found in plaintiffs' favour on this issue, holding that their father was of the whole blood and that they were in the same degree of kinship as Saudagar: but he dismissed the suit as non-maintainable on the ground that while the ladies lived plaintiffs had no cause of action.

On appeal the Calcutta High Court (Stephen and Mullick, JJ.) gave plaintiffs the declaration prayed for. They held that the mere fact that such declaration must be founded on reasons which would support a declaration that plaintiffs were heirs to Deo Narayan (which declaration, it was conceded, was not allowable) could not shut plaintiffs out of their right to a declaration as to the validity of the deed. Hence this appeal.

*Sir Erle Richards, K.C.* and *Dunne, K.C.*, for appellant, submitted that the suit was brought to recover immediate possession on the ground that the execution of the Tamliknama by the widows was an act of waste. But the effect of the deed was any how to give appellant the ladies' interest, and the Sub-Judge rightly dismissed the suit on the ground that so long as the ladies lived there was no cause of action The High Court have given plaintiffs a declaration the effect of which is to declare that they

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are the next reversioners. The reversioners are not entitled to such a declaration—Mayne's Hindu Law, (8th Edition) paragraphs 647, 648, 649 and 651.

(*Lord Parker* referred to the Specific Relief Act, 1877, S. 42 Illustration (*e*).)

Where a suit for possession fails, the Court should not give plaintiffs a declaration to the effect that they are the nex reversioners:—*Janaki Ammal* v. *Narayanasami Aiyar* [1].

*DeGruyther, K.C.*, and *Parikh*, for respondents, were not called on.

Their Lordships' judgment was delivered by

Lord Parker

*Lord Parker of Waddington.*—Their Lordships do not consider it necessary to call upon counsel for the respondents in this appeal.

The question is a very short one. It appears that the High Court from which the appeal has been brought has made a certain declaration. There is absolutely no ground for saying that that declaration is in any way erroneous, nor has counsel for the appellant suggested any error. The point is simply whether, under the practice prevalent in India, such a declaration ought to have been made. In order to show that no declaration ought to have been made, reference has been made to various cases, and in particular to the case of *Janaki Ammal* v. *Narayanasami Aiyar* [1]. The point of that case is this: There was a Hindu widow entitled to an estate, and a suit was brought by a person, presumptively entitled as heir after her death, to prevent waste. It was held that there was no waste at all, and the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or as sometimes called reversionary, heirs, and it was held by this Board that no such declaration ought to be made. It is said that this case is analogous to that, and that no declaration ought to have been made. On the other hand, if section 42 of the Specific Relief Act, 1877, is referred to, it will be seen that one of the illustrations given is this: "The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the

1. (1916) L. R. 43 I. A. 207=31 M. L J. 225.

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alienation was made without legal necessity and was therefore void beyond the widow's lifetime."

It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs. It was intended that this deed should operate to confer the whole interest on the grantee, on the footing that the other reversionary heirs, being of the half blood only, could not come in in competition with the grantee, and the real question in the suit, as far as their Lordships can make out, was simply whether the claimants were claimants of the half blood or of the whole blood, and it was decided by both Courts that they were not of the half blood, but of the whole blood.

Under these circumstances, it appears to their Lordships that this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for. It is quite true that it involves a finding that the appellant in this case is a reversionary heir, but that must always be the case where a declaration is made following the illustration (e) of the section, because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made.

Under these circumstances, their Lordships can see no possible ground for interfering with the decree of the High Court, and the appeal therefore should be dismissed with costs. Their Lordships will tender their humble advice to His Majesty accordingly.

Solicitors for appellant :—*T. L. Wilson & Co.*

Solicitors for Respondents : *E. Dalgado,*

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# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Lakshminarayana Tantri ... *Appellant* 1st Defendant.*

*v.*

Ramachandra Tantri ... *Respondent-Plaintiff.*

Lakshminarayana Tantri v. Ramachandra Tantri.

*Civil Procedure Code, Sched. II, Rules, 14, 15, 21—Guardian of a minor referring minor's interests to arbitration—Guardian revoking submission—Nobody to protect the interests of the minor—Award passed, validity of—" Otherwise invalid" in r. 15, meaning of—Whether ejusdem generis—Whether passing an award under such circumstances amounts to misconduct on the part of the arbitrator.*

Where the plaintiff sued the 1st defendant his brother and the 2nd defendant, the minor son of the 1st defendant for filing an award partitioning their family properties and for a decree in terms of the award, and it is found that the next day after the submission the first defendant who was acting as the guardian of the 2nd defendant gave notice to the arbitrator revoking the submission and thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition, no one being there to watch the proceedings on behalf of the minor and to protect his interests, the award is not binding on the minor, and no decree can be passed on the award and the suit should be totally dismissed.

An award is not *ipso facto* invalid if it cannot be shown to be beneficial or advantageous to the interests of a minor whose claims are referred to arbitration.

*Per Abdur Rahim, J.*—It is open to a minor by a suit instituted either through a guardian or when he attains majority to impeach an award if he can prove that his guardian was grossly negligent or acted fraudulently in conducting the proceedings before the arbitrator.

The facts set out above bring the award passed under these circumstances under the class of awards "otherwise invalid" within the meaning of cl. (c) of rule 15 of the 2nd Schedule to the Civil Procedure Code.

The words "or being otherwise invalid" in clause (c), should not be read as *ejusdem generis* with the other cases mentioned in that clause and are not restricted to cases where an award is bad on grounds like want of jurisdiction; on the other hand, they are meant to include all cases of invalidity on grounds other than those mentioned.

*Per Oldfield, J.*—Arbitrators will fail in their clear duty and be guilty of misconduct if they do not secure for each party an opportunity to present his case.

The duty of the arbitrator in the circumstances mentioned above is to refrain from passing an award so long as they are deprived of the power of passing a just

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* A. A. O. Nos. 357 of 1916 and No. 9 of 1917. 1st October, 1917.

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one and either to adjourn the proceedings in case a change in the representation of the minor is probable or if one is not probable within the period specified for the return of the award, to refuse to act. The arbitrator's failure in this duty amounts to misconduct.

Under S. 21 (1) of Schedule II of the Civil Procedure Code, the court must be satisfied that the matter has been referred and must also enquire into the validity of the reference. In such an enquiry, the question of the beneficial nature of the reference to any minor concerned can be raised.

Appeals against the decree of the District Court of South Canara dated the 13th September 1916, in Original suit No. 3 of 1916.

*K. Y. Adiga* and *K. P. Lakshman Rao* for Appellant.

*B. Sitarama Rao* for Respondent.

The Court delivered the following

Abdur Rahim, J.

**Judgments.**—*Abdur Rahim, J.*:—This appeal arises in a suit to file an award and is preferred by the 2nd defendant who is a minor represented by his mother, the other parties being the 1st. defendant his father, and the plaintiff the brother of the 1st defendant and uncle of the 2nd defendant. All these three persons were members of an undivided Hindu family, and the arbitration was sought for the purpose of partitioning the properties between the plaintiff on the one hand and the first and second defendants on the other. The very next day after the submission, the 1st defendant who was acting as the guardian of the 2nd defendant gave notice to the arbitrator revoking the submission, thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition no one being there to watch the proceedings on behalf of the 2nd defendant and to protect his interests. It has been held that the revocation by the 1st defendant was not justified and the question for decision, therefore, is whether the failure of the 1st defendant as guardian to conduct the case of the 2nd defendant before the arbitrator which in my opinion amounted to gross neglect of his duty is sufficient to vitiate the award. I am clearly of opinion that the contention of the learned vakil for the appellant that an award is *ipso facto* invalid if it cannot be shown to be beneficial or advantageous to the minor is not sustainable. I am not clear that the learned judge in the decision in *In the*

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*matter of Romon Kissen Sett* v. *Hurrololl Sett* [1] has laid down any such proposition. At any rate, I agree with the view of the law as propounded in *Ramji Ram* v. *Salig Ram* [2] on this point. Nor am I able to accept the contention of the appellant that the 1st defendant's interest in the arbitration proceedings was adverse to that of the minor and the submission was bad on that ground. No doubt, one of the questions which the arbitrator had to deal with was whether certain debts incurred by the 1st defendant were binding but that question was not raised between the 2nd defendant and the 1st defendant but only between the plaintiff on the one side and the 1st and 2nd defendants on the other and the decision of the arbitrator has in no way concluded that matter between the 1st defendant and the 2nd defendant.

On the main question there can be little doubt that it would be open to the minor by a suit instituted either through a guardian or when he attains majority to impeach the award if he can prove that his guardian has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrator. There can be no doubt that a decree may be impeached where there has been negligence on the part of the next friend in the conduct of the plaintiff's case, and it is stated by Vice-Chancellor Malins *In re Hoghton* [3]. "The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience.... The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests." See also *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* [4]. It is unfortunate that there is no provision in the Civil Procedure Code which makes it incumbent on the arbitrator, where a reference has been made out of court, to see that the case of the minor is in the hands of a proper guardian, similar to that laid down by order 32 Rule 11 with respect to the Court.

1. (1892) I. L. R. 19 Cal. 334.
2. (1911) 14 C. L. J. 188.
3. (1874) L R. 18 Equity, p. 573 at p. 576.
4. (1894) I.L. R. 22 Cal. 8.

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I think the proposition laid down by Vice-Chancellor Malins is equally applicable to proceedings before an arbitrator. This has hardly been disputed before us. The argument which is used to uphold the award is that the court can refuse to file an award only on the grounds mentioned in the second Schedule of the Code Rules 15, 14 etc, and that, though a separate suit may lie, the same objections to an award which would justify a suit are not available to the minor when the award is fi'ed and sought to be made a decree of court under the special procedure provided by the second schedule. If this argument were accepted it would follow that where an award which affects a minor is invalid because of the fraud or neglect of the guardian in the conduct of the arbitration proceedings the court is bound to pass a decree in the terms of the award although the next day it would be set aside by a suit on the very same allegations. Unless one is compelled by clear words of the statute one would not countenance such an interpretation of the law.

Rule 15 says, "No award shall be set aside except on one of the following grounds :—......" be it noted that this does not seem to be confined merely to objections to filing an award but is wide enough to cover suits to set aside an award including those mentioned in clause (c) which runs as follows, "the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court, or being otherwise invalid." The phrase "or being otherwise invalid" was for the first time introduced into the new code and it seems to me that it is wide enough to cover such a case as this. If an award is invalid under the law governing minors I see no difficulty why such invalidity is not included in these words. It was suggested that "invalid," means "void" and an award which an infant could get set aside would only be voidable, but I do not think that there is any substance in this distinction. If a party does not choose to get rid of an award even in cases falling under clause (c) it would be binding on him and there seems to be no sense in the distinction between void and voidable awards so far as rule 15 is concerned. In fact, that rule itself states the circumstances under which an award becomes "void" in cases dealt with in rule 14 suggesting that awards which can be set aside under rule 15 are not to be treated as void awards.

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Then it was suggested that we must read the words "or being otherwise invalid," as *ejusdem generis* with the other cases mentioned in clause (c) that is to say, it would only apply to cases where an award is bad on grounds like want of jurisdiction. It seems to me that those words do not call for an *ejusdem generis* interpretation, but are meant to include all cases of invalidity on grounds, other than these mentioned. This view seems to have the support of a Full Bench Decision of the Allahabad High Court in *Lutawan* v. *Lachya* [1] where Richards, C. J. says, "It seems to me that it was the clear intention of the legislature by this amendment of the code that objections to the award on the ground of invalidity from any cause whatever would be decided by that court and by no other court.". This passage might also suggest that the only remedy of the 2nd defendant to the suit would be under rule 15 of the 2nd schedule and not by a separate suit. But it is not necessary in this case to consider whether that general proposition is correct.

It is argued by Mr. Sitarama Rao in support of the Lower Court's order that it has not been shown that the 1st defendant as the guardian of the 2nd defendant was, in fact, negligent in the conduct of the case of the 2nd defendant before the arbitrator. But he was not justified in rescinding the submission and when he found that the arbitrator proceeded with the arbitration it was his duty to appear and watch the proceedings and put forward the case of the minor before him. This is not one of those cases in which there may be a question whether the minor had a good defence or not, if a minor has not a good defence to a suit it is undoubtedly not the duty of the guardian to incur unnecessary costs in defending the suit. The very nature of the arbitration proceeding is ordinarily such that every person having a claim would be interested in seeing that the partition made by the arbitrator is just and fair. In this case the minor alleges that by the partition he has been prejudiced. I am of opinion that the appellant has a valid objection to any decree being passed on the award.

Having regard to the nature of the award which is one for partition, the proper order to be passed is that the suit must be totally dismissed. As regards costs, since it was the conduct of the 1st defendant that led to the award being treated

1. (1913) I. L. R. 36 All. p. 69, at p. 74.

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Oldfield, J.

as invalid I would make him pay the costs of the 2nd defendant in this court and in the lower court. The plaintiff—respondent will bear his own costs throughout.

*Oldfield, J.*:—This is an appeal against an order of the District Judge, South Kanara under S. 21 Sch. II C. P. C. filing an award, and against the decree passed in its terms. We have to deal only with the order, since no independent objection has been made to the decree. The arbitrators were asked to make a partition of family property between plaintiff and 1st defendant, brothers, and 2nd defendant, minor son of the last mentioned, the present appellant.

The first objection to the award is that on 2nd defendant's behalf there was no valid submission to arbitration, first defendant, who acted for him, having an interest adverse to his in the proceedings, because an important question in them was whether 1st defendant had incurred certain debts as manager of the family and whether he or its members, including 2nd defendant, were liable for them. But the partition, it was not disputed before us, was of the family properties between the plaintiff on one side and the 1st and 2nd defendants on the other and the interest of the two last mentioned was identical in it, to establish the liability of the family and make a portion of the debts recoverable from plaintiff instead of the whole being recoverable from the 1st defendant primarily and 2nd defendant secondarily in virtue of his sonship.

It is urged next that the lower court should, before filing the award, have considered whether the submission to arbitration and the award itself were advantageous to 2nd defendant. As regards the latter there is, so far as we have been shown, only one authority in support of 2nd defendant's claim, *Romon Kissen Sett* v. *Harrollol* [1], and its weight is small, since it is the decision of a single judge in an uncontested case. It is in fact impossible to consider whether the award, as distinguished from the submission, is advantageous to the minor concerned, without a discussion of the merits of the questions referred, which would be inconsistent with the principles of arbitration procedure; and it was held in *Balaji* v. *Nana* [2] following *Jagan Nath* v. *Mannu Lal* [3], that where the reference was not impugned, the court was bound to pass a decree in terms of the award, if there were none of the objections specified in the Code to doing so. I accordingly

1. (1892) I. L. R. 19 Cal. 334. 2. (1903) I. L. R. 27 Bom. 872.
3. (1894) I. L. R. 16 All. 231.

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turn to the objection that the reference itself was disadvantageous and therefore invalid. Under Section 21 (1) Sch. II C. P. C., the court must be satisfied that the matter has been referred and no doubt, must therefore enquire into the validity of the reference. There is then authority in the first of the two last mentioned cases, which I should be inclined (if necessary) to follow, for the view that the question of benefit to any minor concerned can be raised in such enquiry. See also *Ramji Ram* v. *Salig Ram* [1]. But it is unnecessary to pursue the matter further, because the objection to the reference as distinguished from the award, on the ground of disadvantage to the minor 2nd defendant has not been taken in the grounds of appeal here and was not, so far as appears, taken in the lower court; and I am not prepared to condone the omission and dispose of the point on the materials on record, because it is eminently one which should be stated explicitly with a clear specification of the matters in respect of which disadvantage to the minor was to be feared. It may be added that no attempt at such specification was made in the argument before us.

The next objection is more important. The 1st defendant, the day after he consented to the reference, revoked his consent and no suggestion has been made that this revocation was legally effective. Subsequently he did not attend the arbitration proceedings although as regards him personally the arbitrators fully complied with their duty because they did not proceed or place him *exparte* until they had given him notices of their intention to do both. But throughout 1st defendant appears to have acted also as the guardian of 2nd defendant the decision to proceed *exparte* affected both; and the proceedings took place and the award was passed without any person attending to protect the latter's interest. It is contended that in these circumstances the award should be set aside either under S. 15 (1) on account of the arbitrator's misconduct or under S. 15 (3) as "otherwise invalid".

As I shall accept the first of these contentions, I need not consider whether the general words "otherwise invalid" cover all conceivable grounds other than those already specified, on which an award might in proceedings of any description be set aside or only grounds *ejusdem generis* with those specified in S. 15 (3). Turning to S. 15 (1), I observe first with reference to *Lala Sheo Churn Lal v. Ramnandan Doobey* [2] a decision which has

1. (1911) 14 C L. J. 188. 2. (1894) I. L. R. 22 Cal 8.

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been followed in various unreported cases, that, if first defendant's conduct had occurred in proceedings before a regularly constituted tribunal, it would have justified the subsequent vacation of any decision passed adversely to the minor he represented, since there is no suggestion that he absented himself on consideration of the merits of the case or because he could have had no contention worth advancing with reference to them; and next with reference to Order 32 Rule 11 that the court would have been bound to be vigilant in the minor's interest, and after removing 1st defendant for his failure in his duty, to appoint another guardian in his stead. Are arbitrators, acting, like those here in question, on a reference without the court's intervention under that or any similar duty and is their failure to perform it misconduct? No authority directly in point has been shown us. But generally arbitrators will fail in their clear duty and be guilty of misconduct, if they do not secure for each party an opportunity to present his case: and according to English authority they should even go beyond strict legal requirements in order to do so. *Crompton & Co.* v. *Mohan Lal* [2], *Gladwin* v. *Chilcote* [3], *Haigh* v. *Haigh* [4] and *Whatley* v. *Morland* [5]. The principle involved is one of substance and the case of a minor, such as that before us, is not one, in which it should be relaxed. True, arbitrators cannot, like a regularly constituted court, protect his interest by removing the defaulting guardian and appointing in his stead. But their duty may fairly be taken to be to refrain from passing an award, so long as they are deprived of the power to pass a just one, and either to adjourn the proceedings in case a change in the representation of the minor is probable or, if one is not probable either generally or within the time (if any) fixed for the return of the award, to refuse to act. In the present case the arbitrator's failure in this duty amounted in my opinion to misconduct; and on this ground their award must be set aside.

This entails that the appeal should be allowed, the lower court's decision being set aside and the petition being dismissed. I agree with the order proposed by my learned brother as to costs for the reasons he gives.

C. A. S.

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1. (1913) I. L. R, 41 Cal. 313.
2. (1841) 9 Dow 461, 480.
4. (1861) 31 L. J. Ch 420=3 De G. F. and J. 157.
5. (1833) 2 C. & M. 347 ; 2 Dowl. 949.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Chundooru Lakshmana Setti ... *Appellant* (Plaintiff.)*

*v.*

Duggisetty Chenchuramayya ... *Respondents (Defendants 1* and others. *to 4 and Sppl. defendant).*

Lakshmana Setti *v.* Chenchuramayya.

*Registration Act (XVI of 1908) S. 17 (1) (b) (2) (xi)—Relinquishment of moneys due under a mortgage—Registration, necessity for—Acknowledgment —Receipt for payment.*

An agreement in writing by a mortgagee whereby he relinquishes a sum of more than 100 Rs. out of the mortgage money, requires registration to make it admissible in evidence and it could not be relied on as an acknowledgment or receipt within the meaning of S. 17 sub-S. (2) Cl. (xi) of the Registration Act.

*Abdulla Khan* v. *Basharat Hussain* [1], *Durga Prasad Singh* v. *Rajendra Narayan Bagh* [2], *Tika Ram* v. *The Dy. Commissioner of Bara Banki* [3], *Gobardhan Sahai* v. *Adunath Rai* [4], relied on. *Shidlingappa* v. *Chenbasappa* [5], *Kailash Chandra Nath* v *Sheikh Cenu* [6], distinguished.

Second appeal against the decree of the District Court of Nellore in A. S. No. 70 of 1913 preferred against the decree of the Court of the Additional District Munsif of Nellore in O. S. No. 87 of 1912 (O. S. No. 625 of 1911 on the file of the Court of the Principal District Munsif of Nellore).

*The Hon'ble Advocate-General (S. Srinivasa Aiyangar)* and *K. Raja Aiyar* for Appellants.

*A. Krishnaswami Aiyar* for *T. V. Venkatarama Aiyar* and *R. Rajagopala Aiyar* for Respondents.

The Court delivered the following

Abdur Rahim, J.

**Judgments.**—*Abdur Rahim, J.*:—The only question that we have to deal with in this second appeal is whether Ex. V, which is in these words: "Now if you will pay Rs. 3,000 towards the debt due by you on the two documents we shall receive the money and return the documents," is admissible in evidence having regard to the provisions of S. 17 of the Registration Act.

On the date of Ex. V. more than Rs. 3000 was due, and the balance which the plaintiff agreed to relinquish under Ex. V. amounted much more than Rs. 100. We do not think, though the question under consideration has been argued very elaborately before us, that the matter admits of any real doubt. S. 17, Cl. (b) says that other non-testamentary instruments which

* S. A. No. 1265 of 1915. 1st May 1917.

1. (1912) I. L. R. 35 A. 48 (P. C.)
2. (1913) I. L. R 41 C. 493 (P. C.)
3. (1899) I. L. R. 26 C. 707 P. C.
4. (1913) I. L. R. 35 A. 202, relied on
5. (1879) I. L. R. 4 B. 235;
6. (1914) I. L. R. 42 C. 546.

Lakshmana Setti v. Chenchuramayya.

Abdur Rahim, J.

purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property" must be registered. The exception which it is argued, applies to Ex. V is dealt with in Cl. (11) of sub-S. 2, which lays down that "any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage" need not be registered. It seems to me that an agreement by which the mortgagee agrees to relinquish a portion of the debt is one which "purports to limit or extinguish interest in immoveable property." It was argued by the learned vakil for the respondent that in considering what the interest is we are not to take into consideration the amount of money payable under the mortgage, but only the security apart from the amount due. Such a construction seems to be opposed to the language of the section for in clause (b) the legislature says that an instrument has to be registered if the interest or right affected by it is of the value of one hundred rupees or upwards. Now that would indicate that the interest of a mortgagee cannot be computed without taking into consideration the amount for which the property is made security. Then clause 11 of Sub-section 2, in exempting from the operation of that clause receipts purporting to extinguish the mortgage, tends to support the same view. Though cl. (c) was also referred to in the course of the argument I do not think that it has any application to this case. It seems to me, also, that the question is concluded by authority. In *Abdullah Khan* v. *Basharat Hussain* [1] the question arose with reference to an agreement come to between the mortgagee and the mortgagor as to the mode in which the profits of the property which was usufructuarily mortgaged were to be dealt with: and their Lordships of the Privy Council held that a document like that was inadmissible by reason of the provision of the Registration Act.

It is difficult to see how that case can be distinguished from the present case. I take it that the *rukkee* which introduced a new mode of paying off the mortgage money were held to be inadmissible, on the ground that it was an instrument 'purporting

1. (1912) I. L. R. 35 A. 48. (P. C.)

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to limit or extinguish interest in immoveable property' within the meaning of cl. (b) of S. 17. In *Durga Prasad Singh* v. *Rajendra Narain Bagshi* 1 their Lordships affirmed the judgment of the Calcutta High Court in *Durga Prasad Singh* v. *Rajendra Narain Bahshi* 2 in which it was held that a subsequent unregistered agreement for reduction of rent payable under a registered lease was inadmissible for want of registration. In *Tika Ram* v. *The Deputy Commissioner of Bara Banki* 3 the agreement which was held by the Judicial Committee to be inadmissible was on the part of the mortgagee to pay a higher rate of interest. It is difficult to understand how agreements of the above character could be substantially distinguished from the agreement in question in this case.

The exact point was decided in *Gobardan Sahi* v. *Jadhunath Rai* 4 where it was held that "an agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgment of payment within the meaning of the exception contained in S. 17 Cl. (n) of the Indian Registration Act, 1877, which corresponds to Cl. (11) of sub-section 2 of the present Act.

On the other hand Mr. Krishnaswami Aiyar for the respondent referred us to two cases one of which is reported in *Shidlingappa* v. *Chenbasappa* 5. That was a case under the old Registration Act. The question raised there was whether certain receipts for payment of money were inadmissible for want of registration; and it was held that they were not. I do not think that this decision really throws much light upon the question we have to deal with here. There is a decision however in *Kailash Chandra Nath* v. *Sheik Chenu* 6 which does support the respondents' contention. The learned Judges say "we can find nothing in the law or in any authority which would require such waiver to be registered" the waiver alluded to being that of the right to compound interest. We do not find that any of the decisions to which we have referred are alluded to in the judgment or in the

1. (1913) I. L. R. 41 C. 493.
2. (1906) I. L. R. 37 C. 293.
3. (1899) I. L. R. 26 C. 707. (P. C.).
4. (1913) I. L. R. 35 A. 202.
5. (1879) I. L. R. 4 B 235.
6. (1914) I. L. R. 42 C. 546.

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summary of the arguments at the bar. Nor does it appear from the judgment that S. 17, cl. (b) of the Registration Act was discussed; and the learned Judges refer only to S. 92 of the Evidence Act which requires that such an agreement must be in writing.

I hold therefore that Ex. V is inadmissible in evidence.

The appeal will be the usual mortgage decree for the full amount due under Exhibit H. Time for payment six months from the date of the decree.

Napier, J.

*Napier, J.*—I entirely agree with my learned brother that this matter is covered by authority of the Privy Council. I would only add a few words on the construction of the Section of the Act itself. It would hardly be possible to find words of wider import than we have in Cl. (b) of S. 17. Sub-section 2 of the Registration Act "which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right title or interest". If words of that extremely wide character are not sufficient to cover a case where a mortgage debt is by agreement of parties largely reduced, it seems to me difficult to find words which will have that effect. Then there is this further reason namely that the language of the Cl. (b) actually imports into the consideration of the necessity for registration the question of the value of the interest for it speaks of the right, title or interest being *of the value of one hundred rupees and upwards*, and it is a little difficult to see how, if no question with regard to the amount is, as argued by Mr. Krishnaswami Aiyar, a question "affecting any interest," the amount can be a test for limiting the application of the section. There is, to my mind, further, a complete answer to the argument to be found in the amendment introduced by the Act of 1886 and now incorporated in the present Act of 1908. The language of cl. (b), as I have pointed out, contains the words "limit or extingush" and turning to sub-section 2 which is the amendment, we find this "Nothing in clause (b) applies to............clause (IX) "any endorsement on a mortgage deed acknowledging the payment, of the whole or any part of the mortgage money, and another receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage."

Now here clearly we have a case "of extinction"; so a receipt for the money must be an instrument which operates to extinguish within the language of cl. (b). The same meaning must of course be

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attached to the words 'right, title, and interest' when you are dealing with the question of limitation as when you are dealing with the question of extinction, and if extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an 'interest' within the meaning of that clause, it necessarily follows, it seems to me, that where the effect of the document is to 'limit,' you must also apply the same meaning to the word 'interest' and read it as applying to the amount of money secured. One result of holding that the words 'limit or extinguish' the interest do not apply to words that limit the amount of money to be recovered in future would be that, whereas under this proviso "any other receipt for payment of money due under a mortgage" is only exempted from registration when it does not purport to extinguish the mortgage, if this view was to be upheld that limitation and extinction does not apply to the amount of money, it would be absolutely immaterial whether a receipt for money did or did not purport to extinguish the mortgage, because on that reading of cl. (b) the document itself would not be necessarily registrable under cl. (b), so that that portion of sub-section 2 Cl. (XI) which takes such receipts, out of the operation of clause (b), and also that part which leaves them within it would neither of them have any operation on the reading suggested by Mr. Krishnaswami as there would be 'no interest' to be extinguished and so the whole of clause XI would be meaningless.

I am therefore clear that clause (b) must be given the meaning which the cases show' has been applied to it with the result that this agreement falls within its mischief.

The appeal must therefore be allowed with the result stated in my learned brother's judgment.

A. V. V.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, KT., CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

M. R. M. A. Subramania Chettiar... *Appellant* in C. M. A. No. 195 of 1917 and Petitioner in C. R. P. No. 521 of 1917, Petitioner in C. M. P. Nos. 1684 and 1685 of 1917.*

*v.*

The Hon'ble B. Rajarajeswara Sethupatti *alias* Muthuramalinga Sethupatti Avl. Rajah of Ramnad. *Respondent in all the cases (Counter-Plaintiff.)*

Subramania Chettiar v. Rajarajeswara Sethupatti.

*C. P. C. of* 1908—*Or.* 41 *R.* (5) (3) (*c*)—*Security for due performance of decree—Order for—Immoveable property given as security—Effect—Realisation of property—Remedy of decree-holder—Execution—Suit under S.* 67 *of Tr. of P. Act—C. P. C.—S.* 47—*Applicability.*

Immoveable property given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Or. 41 R. (5) (3) (c) of the Code can be realised by the decree-holder in execution. There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under S. 67 of the Transfer of Property Act.

Effect of immoveable property being given as security considered.

*Sadasiva Pillai* v. *Ramalinga* [1] folld.

Appeal against and Civil Revision Petition under S. 15 of Act V of 1903, and S. 107 of the Government of India Act, 1915 to revise the order of the Court of the Subordinate Judge of Ramnad at Madura dated 23rd July 1917, in E. A. No. 515 of 1917 (E. P. No. 91 of 1917, in O. S. No. 6 of 1902),

C. M. Petitions praying in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of sale of the properties and of further proceedings in E. P. No. 91 of 1917, on the file of the Court of the Subordinate Judge of Ramnad at Madura pending disposal of the above appeal and the Revision Petitions.

*A. Krishnaswami Aiyar* and *M. Patanjali Sastri,* for the Appellants.

*The Hon'ble the Advocate-General (S. Srinivasa Aiyangar)* and *R. Krishnamachariar* for the Respondents.

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* C. M. A. No. 195 of 1917 and C. R. P. No. 521 of 1915; C. M. P. Nos. 1684 and 1685 of 1917. 10th August 1917.

1. L. R. 2. I. A. 219.

Subramania Chettiar v. Rajarajeswara Sethupatti.

The Court delivered the following

**Judgment** :—The question raised in the appeal which is of some importance is, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under O. XLI R. 5 (3) (c) Civil Procedure Code whether that property can be realised by the decree-holder in execution or can only be realised in a separate suit. We have been referred to a decision in *Tokhan Singh* v. *Girwar Singh* [1] that a separate suit is necessary. But the learned Judges who decided that case proceeded upon the prohibition in S. 99 of the Transfer of Property Act as it then was, against bringing mortgaged property to sale except by means of a suit under S. 67 of that Act. That section has been repealed and the prohibition has been limited in O. 34 R. 14, Civil Procedure Code and the decision is therefore inapplicable to the present case and affords no reason for refusing to follow the earlier decision of the same court in *Shyam Sundar Lal* v. *Bajpai Jai Narayan* [2]. Further in that case the point was not taken before the learned Judges that such a sale comes within the provisions of S. 47 (formerly S. 244), Civil Procedure Code which provides that "all questions arising between the parties to the suit in which the decree was passed,............... and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit". If we look at the question on principle and independently of authority, it is difficult to see how the realisation of the security given to the court pursuant to an order of court for the purpose of satisfying the decree-holder can possibly be said to be a matter not relating to the execution, discharge or satisfaction of the decree or not to be a question arising between the parties to the decree. The fact that the bond is given to the court does not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. This bond was given to the Court in the case in *Sadasiva Pillai* v. *Ramalinga* [3] and yet the case was held to come within the section of the Code corresponding to S. 47. If the section is applicable then that being the special provision governing these matters, it would have overridden any general provision contained in S. 99 of the Transfer of Property Act. We are therefore clearly of opinion that apart from authority altogether it is a matter

1. (1905) I. L. R. 32 C. 494. 2. (1903) I. L. R. 30 C. 1060.
3. L. R. 2 I. A. 219.

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arising in execution within the meaning of S. 47, Civil Procedure Code. The effect of immoveable property being given as security is something more than attachment because it makes the property applicable solely in discharge of the judgment debt and not liable for rateable distribution among other judgment-creditors. But the realisation by the Court of such security in execution is of the same nature as sale by the Court of the immoveable property attached, that is to say, it transfers the right, title and interest of the judgment-debtor who has given security. There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under S. 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would further fetter the discretion of the Court in accepting immoveable property as security for the execution of the decree. This view is in accordance not only with *Shyam Sundar Lall* v. *Bajpai* [1], but also with *Mukta Prasad* v. *Mahadeo Prasad* [2], and the dictum of the learned Judges of this Court in *Swaminatha Pathan* v. *Swarnathammal* [3]. What is more important is that is strongly supported by the decision of their Lordships of the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai* [4], where security of immoveable property given for mesne profits which were not awarded by the decree was held to be realisable in execution for such mesne profits, instead of leaving the parties to recover them in a separate suit. Their Lordships observe at p. 232 that security bonds were "proceedings in court importing a certain liability to be enforced in the suit against the defendant in that suit". They further observed at p. 233 that the liability incurred under those bonds amounts to a "question relating to the execution of the decree", within the meaning of the latter clause of S. 11 of Act XXIII of 1861. If the question in that case was one relating to the execution of the decree, *a fortiori* it is so in the present case where security has been furnished to the court pursuant to an order of court under O. 41 R. 5 (3) (c) Civil Procedure Code. It is unnecessary in this case to deal with the case of security given by third parties under S. 145, Civil Procedure Code or with the decisions on that question.

1. (1903) I. L. R. 30 C. 1060. 2. (1916) I. L. R. 38 A. 327.
3. (1911) 2 M. W. N. 432. 4. L. R. 2 I. A. 219.

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The 2nd objection taken to the order under appeal is that it was for the enforcement of the security for a larger amount than that provided for in the bond. Now we think that that bond has already formed the subject of adjudication because the property has been ordered to be sold for the full decree amount and that order was allowed to become final. Further, on the basis that this security was enforceable for the full amount of the decree, the court refused to enforce the decree personally against the judgment-debtor, as it would have otherwise been bound to do, except to the extent of Rs. 7,000 the balance of the decree amount over the estimated value of the immoveable property given as security. In these circumstances, we think the appeal also fails on this point.

In the result, the appeal fails and is dismissed with costs. The Civil Revision Petition is dismissed. As regards the Civil Miscellaneous Petitions Nos. 1684 and 1685 of 1917 for stay no order is necessary.

A. S. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Sunkuru Suryanarayana *alias* Lakshminarayana, being a minor by his mother and guardian Sunkuru Bhimala and another ... *Appellants* * *(Plaintiffs)*.

*v.*

Sunkuru Ramadoss and others ... *Respondents* (*Defendants*).

Suryanarayana v. Sunkuru Ramadoss.

*Hindu Law—Adoption by widow—Consent of Sapindas—Revocation—Validity Conditions—Propriety of reasons for revocation if and when can be scrutinised by Courts—lapse of time after consent—Death of consentor—Effect.*

*Held*: a Sapinda who has voluntarily and *bona fide* given his consent to an adoption by a Hindu widow cannot arbitrarily withdraw his consent. Where a Sapinda who has so given his consent professes to revoke it without assigning any reasons, it would be wrong for the Court to speculate as to what might have led him to act in the way he did.

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* A. S. No. 327 of 1917. 29th August 1917.

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Where a Hindu widow who has inherited the property of her son makes an adoption, she will be divested by her adopted son of the inherited property, even though it constituted the self-acquisition of the deceased son.

*Per Seshagiri Aiyar, J.*; *Semble.* It is open to a Sapinda to revoke his consent before it is acted upon.

Neither mere lapse of time without more, nor the death of the consenting Sapinda, would invalidate the authorisation.

*Quaere* whether, when a Sapinda purporting to revoke his consent acts honestly and puts forward grounds which would satisfy a person of ordinary prudence that he was acting to the best of his knowledge and belief, it is open to Courts to scrutinise his reasons.

Appeal against the decree of the District Court of Ganjam in O. S. No. 2 of 1916.

*V. Ramesam* with him *C. Sambasiva Rao* for Appellants.

*The Hon'ble B. N Sarma, H. Suryanarayana* and *D. S. Dakshinamurthi* for Respondents.

Seshagiri Aiyar, J.

The Court delivered the following

**Judgments:**—*Seshagiri Aiyar, J:*—One Gurumurthi Subudhi belonging to the Vaisya caste had four sons, three of whom were married and the other was unmarried. All the four sons died during his lifetime, the three married sons leaving behind their widows. In this state of circumstances Gurumurthi adopted a boy for himself the 1st defendant in this suit, and made a will on the 28th June 1909 by which he authorised his three daughters-in-law to adopt a son each. The 2nd plaintiff in this case adopted a son under the authority given to her by Gurumurthi. That boy died. Thereupon she attempted to adopt the 1st plaintiff in this case in November 1911 but was temporarily prevented by injunction from doing so. She subsequently adopted him in 1913. The present suit is brought by the adopted son as 1st plaintiff, and by the adoptive mother as second plaintiff to recover the share of the property bequeathed to the latter's 1 adopted son Gurumurthi. Their allegation is that the 1st defendant gave his consent for adopting the 1st plaintiff, that the boy was selected by the 1st defendant, that the secular ceremony of giving and taking was completed in the presence of the 1st defendant in July 1909, and that the 1st defendant dishonestly prevented the 2nd plaintiff from performing the Dattahomam ceremony.

The prayer of the plaintiffs is for a declaration that the adoption of the 1st plaintiff is valid and, in the alternative, that in case the plaintiff's adoption is found to be invalid that the 2nd plaintiff is entitled to the share mentioned in the settlement of Gurumurthi, as the mother and heir of her first adopted son.

The defence of the 1st defendant is that he never gave his consent to the adoption and consequently the adoption is invalid. He raises also the plea that notwithstanding the will of Gurumurthi the family remained undivided and that consequently the second plaintiff is not entitled to the share devised to her by his adoptive father.

The District Judge found that the first defendant did as a matter of fact consent to the adoption of the 1st plaintiff, that the allegation that the ceremony of giving and taking was completed in July 1909 is not made out, that it was competent to the 1st defendant before the actual adoption took place to withdraw his consent, that the conduct of the 1st defendant amounted to an implied withdrawal of the previous consent given by him, that consequently the adoption of the 1st plaintiff was not valid, but that as the parties became divided in status by the provisions of the will of Gurumurthi, the 2nd plaintiff was entitled to the share allotted to her under the will.

The plaintiffs have preferred the appeal for a declaration that the adoption of the 1st plaintiff is valid. The 1st defendant has filed a memorandum of objections questioning the findings against him by the District Judge.

I shall first deal with two questions of fact before dealing with the important question of law which was argued at some length before us. The 1st question is whether the 1st defendant consented to the adoption of the 1st plaintiff. There can be no manner of doubt, upon a perusal of the documentary and oral evidence in this case, that the conclusion of the District Judge upon this point is fully supported. I do not propose to deal with the correspondence at any length, as they have been set out fully by the District Judge. I shall only refer to some of the important documents. Exs. XIII, G, XIV and XV which are letters from the brother of the second plaintiff to the 1st defendant show that the 1st defendant really suggested that the adoption of the 1st plaintiff in preference to other boys who were selected for the purpose. Ex. H. written by the 1st defendant to his natural elder brother on the 5th November 1909 refers to the boy's tonsure ceremony and says that the natural father of the boy may be asked to have it performed at Sihmachalam, and that dattahomam will take place in March or April 1910. There are letters from the 1st defendant

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to the natural father of the boy, Exhibits K and J which prove that the boy was selected by the 1st defendant for adoption. In the school leaving certificate Ex. R the boy's family name is given as that of the 1st defendant's family, and the 1st defendant is referred to as guardian. Then follow Exhibits XVI and XVII from second plaintiff's brother to the 1st defendant in which reference is made to the fixing of the date for the dattahomam. Exhibits M and L from the 1st defendant to the second plaintiff's brother also refer to the same subject. Matters seem to have gone on amicably until June 1910 when for reasons which have not been disclosed in evidence, the second plaintiff and the 1st defendant fell out. We have no correspondence between June 1910 and November 1911 as to the cause of the ill-feeling.

Then we come to the litigation which was started by the 1st defendant. Exhibits I, II, IV, U and W show that he brought a suit for an injunction to restrain the second plaintiff from adopting the 1st plaintiff. The litigation ended unsuccessfully to the 1st defendant. The various documents to which I have referred leave no room for doubt that the 1st defendant actively participated in the selection of the 1st plaintiff for adoption and that he was prepared to have dattahomam performed in March or April 1910, and that this ceremony was put off owing to the intervention of inauspicious events. Further there is the oral evidence of P. W. 12, the adoptive mother, which is clear and consistent. This is what she says "About 4 or 5 years after the death of my father-in-law my adopted son Ramamurthi died. I then asked the 1st defendant to get me another boy for adoption and he promised to get me a boy having given his consent for a fresh adoption." She then refers to the selection of other boys and says "the 1st defendant then said that he would get the son of his sister's daughter from Garabanda of the Parlakimidi Taluq. I, my brother Adinarayana and the 1st defendant went to Palasa and the boy's father brought the boy to Palasa on the receipt of the letter from the 1st defendant. I saw the boy and liked him." This evidence is corroborated by the evidence of P. W. 1 who took a prominent part in carrying on correspondence, on behalf of his sister, the second plaintiff, with the 1st defendant, by P. W. 3 the natural father of the adopted boy. There is no reason for discrediting the testimony of these witnesses, and I therefore agree with the District Judge that the 1st defendant gave his consent for

a second adoption by the second plaintiff and that he selected the 1st plaintiff for that purpose. Excepting the bare denial of the 1st defendant, there is no evidence worth the name as against the oral and documentary evidence adduced on behalf of the plaintiffs.

The second question of fact which was argued by Mr. Ramesam for the appellants relates to the giving and taking of the boy in July 1909. I felt considerable doubts during the course of the arguments whether the finding of the District Judge that there was no giving and taking is correct. On fuller consideration I have come to the conclusion that we must uphold his finding. The District Judge himself says that but for the fact that in the previous litigation this theory of giving and taking was not set up he would have come to a different conclusion. The oral evidence is strong on the point, and it was not seriously shaken in cross-examination. There is however one document which is entirely inconsistent with this theory of giving and taking in July 1909. Exhibit XV is a letter written to the 1st defendant by the second plaintiff's brother dated 30-10-1909. The writer says "As we are all satisfied as to Chiranjivi Lakshminarayana you would consider well whether you would send word to his father's house". If the giving and taking had been completed in July 1909 such a letter would be meaningless. Apparently the boy was taken on trial, and was kept in the house of the 1st defendant as has been done in the case of other boys who were rejected. This document coupled with the omission to state this point in Ex. II the written statement filed by the second plaintiff in the suit of 1911 throws doubt upon the oral testimony given in the case. On the whole, though not without hesitation, I have come to the conclusion that there was no giving and taking in 1909.

The conclusion on facts is that the second plaintiff had the consent of the 1st defendant to take the 1st plaintiff in adoption, the 1st plaintiff was taken to the family house of the parties with a view to the religious ceremonies of Dattahomam being performed, and that the 1st defendant subsequently prevented the adopting taking place, and that the second plaintiff took the boy in adoption in spite of this opposition in 1913.

The question of the sufficiency of the consent was not seriously argued by Mr. Sarma. Even granting for the sake of argument that the family was undivided, the first defendant as the managing member would be the only person whose assent need

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be sought for. Further, the other members of the family were all minors in 1909. If the family were divided. the 1st defendant as the nearest reversioner to the estate of the 2nd plaintiff's husband was alone competent to authorise the adoption.

On the question whether a consent once given can be arbitrarily withdrawn before it was acted upon, there is no direct authority. There is nothing in the Hindu Law texts on the subject. Therefore, before considering the few cases which were quoted as containing pronouncements which logically conclude the question against the plaintiff, I shall endeavour to examine the reason of the rule.

As a widow in a Mitakshara family is incompetent to act *sui juris*, she can make an adoption only if she is authorised to do so by her husband. To this an exception has been engrafted to the effect that the absence of this authority can be made good by the assent of the sapindas. This power has been given to the sapindas, as they are interested in the property and are expected to see that the spiritual welfare of the deceased kinsman is not jeopardised. Their consent is equivalent to an expression of an opinion that the adoption is necessary for the spiritual benefit of the deceased and for securing the secular management of his properties. In *Sri Virada Pratapa Raghunatha Deo* v. *Sri Brozo Kishore Deo* [1] the Judicial Committee speak of the sapindas as "councillors and protectors" of the widow. An analogy for this may be found in the consent of the nearest reversioner being regarded as evidence that the alienation was for justifiable purposes. In the one case, the assent is evidence that the widow is not acting capriciously to serve her own ends, and in the other that she is not illegally disposing of property solely to benefit herself. In both the cases, the assent is presumptive evidence of the goodness of the act. It is open in either case to rebut the presumption. It can be shown that the assent to the adoption was obtained by fraud, mis-representation etc., or that it was given from interested or corrupt motives (*Sri Virada Pratapa* v. *Sri Raghunada* [1].) as it can be shown that the consent of the reversioner to an alienation was not given *bona fide*. This train of thought precludes me from acceding to the proposition that mere lapse of time without more, or the death of the consenting sapinda, would put an end to the authorisation freely

1. (1876) I. L. R. 1 Mad. 69. (P. C.)

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and *bona fide* granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion, the same reasoning should govern the assent to an adoption.

I can understand the party granting the permission deliberately revoking it for justifiable reason. Sir James Colville says in the case already referred to "To, authorise an act implies the exercise of some discretion whether the act ought or ought not to be done." Sir Lawrence Jenkins in *Bhimappa* v. *Basava* [1] says "that the consent required is a matter, not of form, but of substance" and that "it implies an intelligent concurrence on due consideration." Some learned Judges go the length of holding that the assenting Sapinda stands in a fiduciary position to the widow. *Ramachandra* v. *Mulji Nanabhai* [2] is apparently based on this view. In *Narasimha* v. *Parthasarathy*[3] Lord Moulton speaks of the authority given to the widow by the husband as being equivalent to a power of appointment. It will not be an undue stretch of this analogy to characterise the authority vested in the Sapindas as a power to consent to the exercise of the power of adoption. In any view, the consent should be given not capriciously or from corrupt motives, but on a fair consideration of the circumstances which would justify the exercise of the prerogative. In *Ganesh Rathnam Iyer* v. *Gopala Ratnama Iyer* [4] their Lordships of the Judicial Committee pointed out that an assent of a sapinda procured by misrepresentation was not sufficient to validate an adoption. This principle would apply *mutatis mutandis* to the power of revocation which a Sapinda may exercise. I am willing to concede that it is open to a party to revoke a consent before it is acted upon. Further if a Court can pronounce on the validity of the consent, I fail to see why the party himself should not be allowed to reconsider his decision. He can review his opinion just in the same way as tribunals can their decisions. It may be, as argued by Mr. Sarma that the sufficiency of the reason should not be canvassed by the courts. If he acts honestly and puts forward grounds which would satisfy a person of ordinary prudence that he was acting to the best of his knowledge and belief, it is open to argument that courts should

1. (1905) I. L R. 29 Bom. 400.
2. (1896) I. L. R. 22 Bom. 558.
3. (1913) I. L. R. 37 M. 199.
4. (1880) I. L. R. 2 Mad. 270.

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not scrutinize his reasons. At the same time, I am unable to assent to the contention of the learned vakil for the respondents that where the party professing to revoke the consent assigns no reasons, his legal advisers can draw attention to materials on which his conclusions might have been based. What the courts are concerned with is not what might have operated on the mind of the revoking party, but what did influence him. The judgment of his legal advisers should not be substituted for the party's.

For the above reasons I am of opinion that a Sapinda cannot arbitrarily withdraw his consent and that the question is not whether the courts should find a justification for the revocation, but whether a justification was offered, In the present case the 1st defendant strenuously denied that he gave his consent and he has not put forward any grounds in the written statement or in his evidence to justify the withdrawal of the consent. It would therefore be wrong to permit any speculation regarding what might have led the first defendant to act in the way he did. I must hold that he acted arbitrarily in refusing his assent to the factum of adoption, and that this conduct on his part is not enough to nullify the consent which was voluntarily and *bona fide* given by him.

I shall now proceed to deal with the few cases that were cited in the argument. *Mami* v. *Subbaraya* [1], was strongly relied on by the respondents. In that case, the learned Judges inclined to the view that a consent lapses with the death of the consentor. The reasoning which I have pursued is not quite in accordance with this proposition. I am not saying that it is not open to the Sapindas who are alive at the time of adoption to prove that the assent of the dead man was not obtained honestly. If that was so obtained, I would hesitate to hold that the death of the consentor put an end to the consent. But, I do not want to pursue the matter further. Reliance was placed upon the sentence "It must, we think, be conceded that, if a Sapinda who has given his consent withdraws it afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that the consent once given should become irrevocable by the death of the Sapinda giving the consent so as to override the opinion of the Sapindas who subsequenly became entitled to be heard." I do not think the learned Judge intend-

1. (1911) I. L. R. 36 Mad. 145.

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ed to lay down that the withdrawal can be arbitrary. They had not that aspect of the question before them. The observations in *Subrahmaniam* v. *Venkamma* [1] on which the learned Judges in *Mami* v. *Subbaroya* [2] rely were purely *obiter*. No question of revocation was considered in the earlier case. Attention may also be drawn to *Nagarampalli Kamesam* v. *Nagarampalli Batchamma* [3] where attempts seem to have been made to explain away the pronouncement in *Mami* v. *Subbaraya* [2]. See also *Krishnayya* v. *Lakshmipathy* [4]. There is no pronouncement of the Judicial Committee or of the other High Courts on this qnestion.

In my opinion, it would be opposed to all notions of fair play and justice that the party who is clothed with the authority to consent to an act should, after giving his deliberate vote in its favour be permitted arbitrarily and capriciously to resile from it. I therefore hold that the 2nd plaintiff was justified in taking the 1st plaintiff in adoption, notwithstandihg the demur of the 1st defendant. In this view, it is unnecessary to consider whether the will of Subudhi brought about a severance of the coparcenary interests among the members of his family. On a minor point argued by Mr. Sarma in the memorandum of objections, namely, ground No. 11, I agree with the conclusion of the District Judge.

After we reserved judgment Mr. Sarma asked permission to argue a new point of law. Although this was not raised in the Court below we heard him as the question did not involve the consideration of any fresh evidence. The contention was that as according to the plaintiff, the share taken by the 2nd plaintiff's first adopted son was self-acquired property and as on the death of that adopted son the property was inherited by the 2nd plaintiff as mother, the second adoption was incapable of divesting her of that inheritance. Mr. Ramesam repudiated the suggested interpretation of the plaintiff's case. It is needless to go into this question. Granting for argument's sake that the share taken by the first adopted son was his self-acquisition, there is no warrant for the contention that inheriting mother could not be divested of that property by the adoption which she made subsequently. The

1. (1903) I.L.R. 26 Mad. 627, 635. 2. (1911) I. L. R. 36 Mad. 145.
3. (1914) M. W. N. 620. 4. (1916) 30 M. L. J. 265.

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*Guntur—Case Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [1] is authority for the proposition that a mother succeeding as heir to her son would be divested by her adopted son of the inherited property. There can be no distinction in principle between property owned as ancestral or which is taken as self-acquisition. The case in *Mussammat Bhooban Debia* v. *Ram Kishore Acharj Chowdury* [2] related to property which vested in the widow of the adopted son. In the present case the first adopted son died unmarried. We must therefore overrule this contention.

For the above reasons, the decision of the District Judge in so far as it dismisses the suit of the 1st plaintiff must be reversed and his decree should be modified by declaring that the 1st plaintiff as adopted son is entitled to the share decreed to the 2nd plaintiff. The appellants are entitled to their costs in this and in the Court below and the costs will be taxed on the value of the property decreed to the 1st plaintiff,

Ayling, J.

*Ayling, J.*:—I agree.

A. S. V.

1. (1876) I. L. R. 1 Mad. 174. (1865) 10 M. I. A. 279.

## PRIVY COUNCIL.

PRESENT:—LORD DUNEDIN, LORD SHAW, LORD SUMNER, SIR JOHN EDGE, AND MR. AMEER ALI.

Thakur Sri Radha Krishna Chanderji. ... *Defendant * Appellant.*

*v.*

Ram Bahadur and Others ... *Plaintiffs Respondents.*

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*Hindu Law—Debts—Son's liability for father's debts—Liability of ancestral joint family property—Claim of right based on a general Rule subject to exceptions will not be entertained by Privy Council unless raised in Courts below—Right of creditor to proceed against ancestral property of Hindu joint family for father's debts—May be waived by his own election to proceed against his debtor only—Symbolical possession—Sufficient to interrupt adverse possession.*

The general rule of Hindu law is that the ancestral property in a joint family may be made liable for the father's debts, unless those debts are shown to have been for an illegal or immoral consideration: but this rule is not always applicable, *e. g.* the creditor's conduct may evidence his intention not to resort to any such right.

Where therefore it appeared that the interest of the father had been taken in execution, but it was sought in the Privy Council to extend that interest beyond his life on the ground that his sons were liable under the aforesaid rule;

*Held*: that such an argument was no longer open to the attaching creditor, as there might have been an answer to it if it had been raised in the Courts below.

Symbolical possession is sufficient to interrupt adverse possession if the adverse possessors are parties to the proceedings in which it is given.

*Juggobandhu Mukerji v. Ram Chandra Bysack* [1] followed.

Appeal against a decree of the Calcutta High Court, dated June 24, 1913, reversing a decree of the Additional Subordinate Judge of Monghyr.

The facts of the case sufficiently appear from their Lordships' judgment. The trial Judge held that the 150 bighas therein mentioned, claimed by the defendant as purchaser of the interest of Sheo Perkash Misser, were the absolute property of the said Sheo Perkash, and that plaintiffs-respondents acquired no title thereto from his sons. He also held that plaintiffs' suit was barred by limitation. On both these points his decision was reversed by the High Court who held that all that Sheo Perkash reserved to himself and all that the defendant bought was a life interest, and that on Sheo Perkash's death the 150 bighas reverted to the joint family. On the point of limitation they held that symbolical possession was given to plaintiffs in the execution proceedings, and that as defendant had been made a party to those proceedings

* 21st and 22nd June and 3rd August, 1917.

1. (1880) I. L. R. 5 Cal. 584 (F. B.)

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this was sufficient to interrupt the 12 years' adverse possession on which defendant relied. They accordingly gave plaintiffs a decree for the 150 bighas. Hence this appeal.

*Dr. Abdul Majid,* who appeared for the appellant (the respondents being unrepresented) submitted that the 150 bighas were expressly excluded from the sale at which plaintiffs bought but that anyhow the sale to defendant was of the right title and interest of the father, and that by purchasing under his decree the defendant got a good title not only against the father, but against the sons. It is not absolutely necessary they should be made parties: their interest is liable for their father's debts. *Mayne's Hindu Law,* paragraph 321; *Maddun Thakoor* v. *Kantoo Lall* [1]. (The Board intimated that this point had never been taken before in the case and that they must decline to go into it).

There remains the point of limitation. If any symbolical possession was given at all, it did not cover this 150 bighas : but anyhow, symbolical possession would not interrupt our adverse possession : to do that, actual dispossession was necessary.

Mr. Ameer Ali referred to *Juggobundhu Mitter* v. *Purmanund Gossami* [2].

The two rulings on which the Calcutta High Court rely refer to lands in the occupation of tenants, as to which symbolical possession was the only possession possible : this is not so here.

(*Lord Sumner* asked if the point had been taken before ? Mr. Ameer Ali pointed out that one of the grounds of appeal in the application for a certificate seemed to cover it.)

It is a question of law.

Lord Sumner.

(*Lord Sumner:*—It is a question of procedure in execution. You say symbolical possession was the wrong thing to do : that they ought to have taken actual possession.)

The two cases cited against me do not apply. It has been held in Bombay by a Full Bench that symbolical possession is not equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect. *Mahadeo Sakharam Parkar* v. *Janu Namji Hatle* [3] (*Lord Dunedin*: That was the case of a judgment-debtor.)

1. (1874) L. R. 1 I. A. 321. 2 (1889) I. L. R. 16 Cal. 530.
3. (1912) I. L. R. 36 Bom. 373.

Their Lordships' judgment was delivered (August 3, 1917) by

*Lord Sumner* :—This was a suit to recover possession of 150 bighas of land in Mouzah Nagdah, in the pergunnah of the same name and the district of Monghyr. The plaintiffs had acquired *inter alia* such right in that land as could be sold under a decree in favour of mortgagees against two members of a joint Hindu family, named Rudra Parkash Misser and his younger brother, Dharam Parkash Misser, and they alleged this right to be the full title to the land. The principal defendant, an idol by his shebaits, who were in actual possession by their tenants, claimed in right of a judgment creditor of the father of Rudra and Dharam, who had bought the land at an execution sale under his decree in 1883, and they alleged that the title thus derived from the father was better than any title that could be derived from his sons. They also relied on adverse possession. They proved that they had held the land by their tenants for many years before the suit, but the plaintiffs in reply alleged effective interruption of their possession within twelve years before the suit. The Subordinate Judge decided for and the High Court against the defendant ; hence this appeal. The respondents did not appear at their Lordships' bar. There were other parties to the suit, but in substance none were interested except those above mentioned.

Pandit Babu Sheo Parkash Misser, who lived at Mirzapur Gobardhan, in the district of Monghyr, was the head of a joint Hindu family of Zamindars, governed by the Mitakshara law, which was entitled to considerable property in Behar. In 1873 he executed what has been called, somewhat loosely, a deed of gift in favour of his only son, Pandit Babu Rudra Parkash Misser, then a child. There were other members of the family beside Sheo and Rudra. By this deed he recited that among other family properties there was an 8-annas share in Mouzah Nagdah and he conveyed by gift to his son all his rights and interests in that and other properties and then declared that—

"400 rupees per month ...shall continue to be paid to me....for defraying the expenses of the maintenance of me, the declarant, and for meeting my personal expenses and, over and above that, 150 bighas of land by measurement, situate in Mouzah Phulwaria, or in any other Mouzah, shall remain in my possession and occupancy as zirat land, and the measurement and the demarcation of the boundaries thereof shall be made as soon as possible, and the said land shall be held by me in my possession as zirat without paying any rent therefor."

There were other provisions, but it does not seem material to consider them on the present appeal.

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Lord Sumner

No doubt so unusual a transaction might be called in question on various grounds. The appellant did, indeed, suggest that its object was to defeat and delay creditors, but, as such a point ought to have been made at the trial, so that the facts might have been investigated, their Lordships declined to entertain it.

The appellant in the proceedings below made this deed the basis of his claim of title, and as the respondents accepted it as valid in the courts below, the only question which arises upon it for their Lordships is one of construction, namely, what was the interest in the 150 bighas which Sheo Parkash reserved to himself? It is not necessary to examine what precise right Sheo Parkash may have had, as head of a joint family, to make such an arrangement, although no separation of the family took place nor were its properties divided, or to create anew zirat land out of that, which had been theretofore merely part of the zamindari land of his family. In the view which their Lordships take it is sufficient to answer this one question. That interest continued no longer than his life, and determined when he died in 1893 leaving his two sons, Rudra Parkash and Dharam Parkash, him surviving. Subsequent events made the words "as zirat land" of some importance. Their Lordships think that on the true construction of these words, as used in this connection, they merely mean "for the personal use and maintenance of the declarant himself, without paying any rent therefor." As between ryot and zamindar, and sometimes as between the zamindar and the revenue authorities, questions as to zirat or zarait lands involve very different considerations. The present case, however, is not one which touches a ryot's claim to be protected against dispossession so long as his rent is paid, or a zamindar's claim to an abatement of jumma in respect of lands held by him for his maintenance as zirat. In this case the word is used merely to describe the kind of interest reserved to the grantor under this particular deed, and its interpretation does not affect the general law or custom as to zirat lands. The land was never in fact cultivated by Sheo Parkash nor had it ever been recognised by village usage as his private land. The deed reserves a certain area, to be thereafter particularly set out, for the declarant's occupation, rent free, as part provision for his personal maintenance, his sons and other dependants being otherwise provided for under the general disposition of the family properties made by the deed. So used,

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the term "*zirat*" ceased to be a description truly applicable to these lands after the death of the declarant, nor could third parties, who were entitled to his rights alone, found upon this word any claim to rights in the land, which he could never have enjoyed. With the determination of his interest this land would again form part of the general zamindari property of the undivided family. During the life-time of Sheo Parkash the interest of his son Rudra in the 150 bighas would be a vested zamindari interest in reversion. On the father's death the suspension of his right as zamindar to collect rents from the tenants of it would terminate, and as manager and head of the joint family, he would possess and enjoy this parcel in like manner as the rest of the family property. Such upon the argument presented to their Lordships appears to be the true effect of this deed.

That the interest of Sheo Parkash, *tale quale,* was validly assignable has not been contested, and their Lordships will assume it to be so for present purposes. Some years after he executed his deed Sheo Parkash was sued for debt by the predecessors in title of the present appellant. For what the debt was contracted or when does not appear. A decree was obtained, and in execution proceedings his right to the 150 bighas was sold in 1883 to the decree-holders. They then claimed to have this area delimited and obtained an order in 1886, which was duly executed in 1888, that a sufficient area of land fit for khudkhast should be set out. To these proceedings Rudra Parkash and Dharam Parkash were made defendants. Evidently Sheo Parkash had not asserted his right to have this land set apart for his use, and probably, as was stated below but not proved, he had received money payments, which had made any demarcation unnecessary. Clearly there was no partition by the family. The decree-holders in 1886 got possession of the 150 bighas as if they had been in the occupation of Sheo Parkash and for his interest therein, whatever it might be. Doubtless they supposed that interest to have been absolute, and the family may have thought so too, but the point does not seem to have been raised. Subject to the question of dispossession in 1898, they have enjoyed the rents of it ever since. A series of zarpeshgi pattahs, mustajiri pattahs, and kabuliyats was produced, and sufficiently established the case.

Before their Lordships the appellant took this new point. Even if the interest of Sheo Parkash in the land, which was sold

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in execution, determined with his life, it was said that the interest of his sons must be deemed to have been sold too, for the ancestral property in a joint Hindu family may be made liable for the father's debts, unless they can be shown to have been for an illegal or immoral consideration. Such rules, however, do not always apply. The creditor's conduct, for example, may evidence his intention not to resort to such a right, whereby, after all, one man's property is taken to pay another man's debt. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interest, and no further. In the present case there is strong evidence of such an intention. The certificate of sale moreover, dated the 10th January, 1884, recites that the decree-holder, Krishna Mohan Ghatak, has bought "the right and interest of the judgment debtor, Sheo Parkash Misser, to be allotted by division, namely, by a separate allotment of 152 bighas of land...for the purpose of cultivation." It does not appear that he claimed execution at any time against the family property generally. The whole of the facts should have been investigated at the trial. Certainly their Lordships ought not to decide upon a general claim of right, now first raised, when there appears to be, to say the least of it, a *prima facie* answer, which might have been completely made out if the appellant had raised the contention in the Courts below. They are of opinion that such an argument is no longer open to him.

In 1889, while Sheo Parkash was still alive, his two sons mortgaged the family estate including their share in Mouzah Nagdah, to the predecessors in title of the present plaintiffs. After his death the mortgagees took proceedings to enforce the mortgage, and, among others, made the predecessors of the present defendants parties to them. In due course a decree was obtained, and upon the application for a sale in execution, it was asked that the order should apply to the mortgaged properties "with the zarait lands" *(mai arazi zirat)*. On a formal objection being taken to the addition of these words by the predecessors of the present appellant, it was held that the Court was bound to sell the mortgaged property as described in the mortgage bond without addition. The order thereupon made must be construed as if it applied only to "Nagdah, original with dependency, all the zamindar's rights, together with the tolas known by district names or otherwise," following the language of the mortgage.

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The sale accordingly took place, and the mortgagees were the purchasers. They received a sale certificate that they were entitled to "all the zamindari rights in 8 annas pucca of Mouzah Nagdah," and, the land being in occupation by cultivating tenants under an apparently *bona fide* title, they received formal possession as usual after due proclamation by beat of drum in 1898.

This interruption, if such it was, of the defendants' actual possession was not of long duration. Hence the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before the suit began. The Subordinate Judge held that in fact the symbolical possession, given under the circumstances mentioned, did not apply to the 150 bighas. He construed the order as if it had expressly excluded them, because of the deletion from the proposed order of the words "*mai arazi zirat.*" Their Lordships think that this cannot be sustained. The true construction of the decree depends on what the Court actually ordered, not on what it refused to order. The order for possession applied to the 150 bighas because, following the description of the mortgaged lands, it extended to the lands in which the mortgagors, as zamindars and members of the undivided family, had a reversionary zamindari right, albeit subject to the interest which Sheo Parkash retained for his life.

In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court, following a decision of the full bench in *Juggobundhu* (*Mukerji* v. *Ram Chandra Bysack*, [1] held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered. In the result the appeal fails, and their Lordships will humbly advise His Majesty that it ought to be dismissed with such costs as have been incurred by the respondents in entering their appearance.

Solicitors for Appellant :—*Truefitt and Francis.*

Solicitors for Respondents :—*T. L. Wilson & Co.*

A. P. P.

1. (1880) I. L. R. 5, Cal. 584. (F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR, AND MR. JUSTICE KUMARASWAMI SASTRI.

Kumarappa Reddi ... *Appellant** (*Plaintiff*).

v.

Manavala Goundan ... *Respondents* (*Defendant*).

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Kumarappa Reddi v. Manavala Goundan

*Civil Procedure Code, S. 100 (1) (a)—Custom or usage—Finding as to, if one of fact or of law—Interference by High Court in Second appeals, limits of*—Mirasidar—*Right to* Thunduwaram—*Custom in Chingleput District—Admissions by party to the suit, value of—Suit for recovery of* Thunduwaram, *not cognizable by Small Cause Court—Provincial Small Cause Courts Act, Sch. II art. 13—Second appeal, maintainability of—Civil Procedure Code, S. 102.*,

*Held by the Full Bench*:—The question whether the facts found by the courts below establish a valid and binding custom or usage is a question of law but the question whether such a state of facts has been proved by the evidence is one of fact on which the High Court, in second appeal, is bound by the findings of the lower appellate court.

*Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [1] overruled. *Pankajammal* v. *The Secretary of State for India* [2], *Kailas* v. *Padmakisor* [3], Referred to.

The express admissions of a party to the suit are strong evidence against him and courts will not be justified in ignoring them as of no importance

The liability to pay *swatantrams*, though a well-known incident of the *mirasi* tenure in the Chingleput District, is not universally prevalent. Where, therefore, a tenant denies the right of a *mirasdar* to *Thunduwaram* the onus is on the *mirasdar* to prove that he is entitled to the dues by the custom of the estate or the neighbourhood.

*Sakkaji Rao* v. *Latchmana Goundan* [4] Relied on.

*Held further*, reversing the decision of the Courts below, that the evidence in the case was sufficient to prove the customary right of the mirasidar to receive *Thunduvaram* from the ryots of the *mirasi* village.

Per *Sadasiva Aiyar and Napier, JJ.*—A suit by a *mirasidar* for recovery of *Thunduvaram* from a ryot, is a suit falling within art. 13 of Sch. II of the Provincial Small Cause Courts Act. Consequently the decree in such a suit is open to second appeal though the value of the claim is less than 500 Rs.

Second Appeal against the Decree of the District Court of Chingleput in Appeal Suit No. 542 of 1911 preferred against the Decree of the Court of the District Munsif of Chingleput in Original Suit No. 12 of 1910.

The Second Appeal came on for hearing on 20th September 1916 when the Court (Sadasiva Aiyar and Napier, JJ.) delivered the following

**Judgment**:—The plaintiff is the appellant. He brought the suit to recover Thunduwaram alleged to be due to him as mirasidar

* S. A. No. 1660 of 1916, 23rd November, 1917.

1. (1905) I. L. R. 29 M. 24.
2. (1916) 32 M. L. J. 237.
3. (1917) 25 C. L. J. 618.
4. (1880) I. L. R. 2 M. 149.

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by the defendant who is a Government ryot in a mirasi village. A preliminary objection was raised by the respondent's learned vakil (Mr. T. R. Ramachandrier) that no second appeal lies as the suit was of a small cause nature and the value of the claim is less than Rs. 500. In our opinion, mirasi right is an interest in the village lands, though it may not now be a proprietary interest therein. The Thunduwaram payable to the mirasidar (assuming it to be payable) might have once been part of the Kudivaram produce, but it is now claimed merely as the fee due to the mirasidar as such by custom. Hence it is not of the nature of "rent" (like Jodi), but comes under the general expression "dues" in article 13 of the Provincial Small Cause Courts Act.

We therefore overruled the above preliminary objection. We are unable to agree with the learned District Judge that the plaintiff's claim to obtain Thunduwaram (a part of the mirasidar's swathanthram) from the defendant became barred in 1890, because the Government refused some time prior to 1878 to recognize the custom under which the mirasidar claimed such dues. Evidently the learned District Judge has applied article 131 of the limitation Act as he states that "there must have been a refusal" (by the defendant to pay the Thunduwaram to the mirasidar) "prior to 1878". The learned Judge then on this sole ground of the Government's disinclination in 1878 to recognize the custom in favour of the mirasidar considered that he would be legally justified in finding that "there must have been a refusal" (by the defendant) "prior to 1878". We think that such a finding must be treated as one based on no legal evidence and cannot be accepted. The recent Full Bench decision in *Seshachella* v. *Para Chinnasami* [1] does not deal directly with the mirasidar's right to Thunduwaram (the question directly in issue in that case being the mirasidars' alleged right to eject occupiers of Nattam Poramboke land sites held under pattahs). There are, however, passages in two of the judgments in that case which relate to Thunduwaram and which are entitled to great respect. We therefore refer to them. Mr. Justice Ayling says "there are undoubtedly certain incidents, which have been claimed as attaching to it" (the mirasi tenure) "from ancient times, and have to some extent been recognised," one of such incidents being "the right to certain fees (thunduwaram) on lands granted for cultivation to non-mirasi cultivators (payakaris) by

1. (1916) I. L. R. 40 M. 410. (F. B.)

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the Government". Then the learned Judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Latchmana Goundan* [1]. Mr. Justice Kumaraswami Sastri refers to the opinion of the Collector of Chingleput in 1839 which admitted the mirasidars' right to collect thunduwaram, swathanthrams, etc., in the sheikal lands. In another place, the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows:—"Briefly, the system, as it at present exists rests on the claims of the mirasidars to all the waste lands in their villages and to the levy of swathantram or fees from payakarees or non-mirasidars who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876-78 (*Vide* G. O., dated 15th February 1876, No. 221) and after full consultation with the mirasidars, a memorial free (swathanthram), fixed at an average rate of 2 annas on every rupee of Government assessment, was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such land be subsequently relinquished and taken up by a non-mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government." Then the learned Judge refers to the Government orders passed on the 19th October 1909 about swathanthrams as follows :—" The right of the mirasidars to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands has been recognised by Government except in the case of the undermentioned fields which are free of swathanthrams so long as they are held under the terms of the original grants." Next the learned Judge referred to *SakkjaiRau* v. *Latchmana Gaundan* [1] in which it was held that " where the right was denied there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood."

In the result, following the decision in *Sakkaji Rau* v. *Latchmana Goundan* [1] which was recognised as good law by the

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judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the mirasidar to Thunduwaram, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues.

Now the learned District Judge in considering the evidence in this case as to custom has fallen into several material errors. He thinks that documents relating to other than the plaint lands which establish the claim of the mirasidar to Thunduwaram are not of much value. But the decision in *Sakkaji Rau* v. *Latchmana Goundan* [1] which states that evidence even as to neighbouring villages and estates is admissible is clearly against the District Judge's view. Then he seems to think that Exhibits H, E and K do not relate to plaint lands, but it has been shown that they do relate to some of the lands against which no swathanthram is shown as due in Exhibit J. It is contended for the respondent that the lands to which those documents refer were waste lands granted by Government after the year 1878 when an arrangement was made between the Collector and the mirasidars by virtue of which they were to be allowed Swathanthrams on such lands in consideration of their waiving their claim in respect of lands already granted by Government and lands taken up by the mirasidars themselves and abandoned. This may or may not be so but we are at present only concerned with the question how these documents have been dealt with by the District Judge and there is no doubt that he has fallen into an error of fact. Then he thinks that the omission in the documents Exhibits III to V (*b*) and VII to VIII (*b*) of any reference to thunduwaram is strong evidence in the defendant's favour. Most of them are, however, sale deeds and it is not usual or necessary in such deeds to insert a recital that a purchaser should thereafter pay the theervai or thunduwaram payable on the lands sold. It is the duty of the purchaser to do so, whether it is mentioned in the sale deed or not. The District Judge has declined to give any weight to old documents on the ground that it is admitted that mirasidars had many more privileges in the old days. (*Vide* para 5). This method of dealing with a question of custom is not correct. The evidence covering the whole period must be examined. It may be that the earlier evidence is not sufficient to establish the custom: it may be that

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it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered which admittedly has not been done in this case. The agreement, Exhibit B, again, is brushed aside by the District Judge as a document executed without consideration. If, of course, we assume that the mirasidar has no right to thunduwaram, Exhibit B was executed without consideration. But that is the very point in issue. Anyhow, Exhibit B is a clear acknowledgment by the tenant of the mirasidar's right to thunduwaram and must be given whatever consideration it is worthy of in arriving at a conclusion on the question of the Mirasidar's right by custom to claim thunduwaram. The Diglot Register Exhibit VII read with Mr. Puckle's report and the subsequent conduct of the Mirasidar in not claiming thunduwaram for 16 years before 1905 may afford evidence that the Mirasidar had no right by custom to claim thunduwaram on waste lands which he had not been cultivating and which had been granted as waste by Government to outside Payakaree tenants and it can even afford evidence that he abandoned his customary right so far as those lands are concerned. But as regards those lands in respect of which the right to thunduwaram is recognised in the Diglot Register itself, it is for the defendant to prove that the Mirasidar has abandoned such customary rights and mere nonreceipt of the dues will afford very weak evidence of such abandonment. There are other matters in which the judgment is unsatisfactory, notably the statement in para. 4, line 35 that the defence witnesses deny payment of thunduwaram. This is not correct. They admit payment but seek to explain it away.

We cannot accept findings based on incorrect tests as to custom and mistakes of fact as to the effect of documents. We therefore send back the records to the District Judge for fresh findings on issues 1 and 2 with reference to the above observations and for findings on the 3rd and 4th issues. The time for submission of findings will be four weeks from the receipt of records and 10 days for objections.

[In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted findings which are set forth in the order of reference to the Full Bench.]

*L. A Govindaraghava Aiyar* and *D. V. Neelamegha Chari* for the Appellant.

*T. R. Ramachandra Aiyar* for Respondents.

The Court (Sadasiva Aiyar and Phillips, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

*Sadasiva Aiyar, J.*—The plaintiff is the appellant. This litigation commenced in December 1909 (nearly 8 years ago) but I have felt it advisable that the whole matter of this second appeal should be referred to a Full Bench as some questions of law of more than ordinary importance are involved in its decision. Without expressing a final opinion on any of the questions involved or as to what should be the final result of the second appeal, I shall set out the material questions of fact and law making provisional comments here and there.

The suit was brought for recovery of Rs. 168-11-3 being the amount of thunduwaram perquisites due to the plaintiff as Ekaboga mirasidar of Chittamur village (in the Madurantakam Taluk, Chingleput District) from the defendant who is a ryot in the village, the thunduwaram being claimed at 15 markals per cawni of wet land for the first crop, 7½ markals per cawni for the second crop and 3⅓ annas per cawni of dry land. The tunduwaram was claimed by the plaintiff by virtue of his mirasi right over the village and also by reason of an agreement, that is, a registered muchilika, dated 26th January 1905, Exhibit B, executed by the defendant. The District Munsif held (*a*) that the mirasidar's right to collect the plaint perquisites "fell into disuse" about 1870 that "it was too late in the day for him now to seek its enforcement as a subsisting right on the basis of the general custom in the village"; (*b*) that the defendant executed the muchilika, Exhibit B of 1905, possibly "in order to help the plaintiff in his endeavours to resuscitate the plaintiff's primitive right which had fallen into disruption" and that it was also possible "that the defendant executed a document under a misapprehension as to the exact right of plaintiff to enforce the fee at present" and the District Munsiff finally thought that "on the whole there was no legal consideration" for the plaint agreement. He therefore dismissed the plaintiff's suit.

On appeal the learned District Judge (Mr. Booty) held that as in the Settlement Register (Exhibit J of 1878), it was recorded that "the lands for which pattas had been given by Government to payakaris or on Dharkast to mirasidars were exempted from swathanthram fees" and as the plaintiff had failed to prove that the

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plaint lands fell under the category of lands other than those exempted from swathanthram fees according to that settlement register and as the defendant had probably refused prior to 1878 to pay thunduwaram to the mirasidar on the strength of the statement in the settlement register, "the mirasidar's right was dead by limitation in 1890." He further held that the muchilika, Ex. B of 1905, had absolutely no consideration to support it. He therefore dismissed the appeal.

When this second appeal first came on for hearing on the 17th December 1914 before a Divisional Bench of this Court, it was adjourned *sine die* for the decision of the Full Bench to which the general question of mirasidars' rights were referred in S. A. No. 210 of 1911. The opinions of the Full Bench in that case were pronounced on the 17th February 1916 and they are reported in *Seshachala Chetty* v. *Chinnasami* (see from page 447). The present second appeal then came on for hearing before myself and Mr. Justice Napier in September 1916. We found ourselves unable to accept the finding of the District Judge "that the plaintiff's claim to obtain thunduwaram" (a part of the mirasidar's swathanthram) "became barred in 1890." Then as regards the right of the mirasidar to collect thunduwaram, I shall here quote from my above order of the 20th September 1916 concurred in by Mr. Justice Napier, "Mr. Justice Ayling (in *Seshachala Chetty* v. *Chinnasami* [1] says "There are undoubtedly certain incidents, which have been claimed as attaching to it" (the mirasi tenure) "from ancient times, and have to some extent been recognised," one of such incidents being, "the right to certain fees (thunduwaram) on lands granted for cultivation to non-mirasi cultivators (payakaris) by the Government." Then the learned judge says that this right also requires to be separately established by the mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Latchmana Gaundan* [2]. Mr. Justice Kumaraswami Sastri refers to the opinion of the Collector of Chingleput in 1839 which admitted the mirasidar's right to collect thunduwaram, swatantrams, etc., in the Sheikal lands. In another place, the learned judge quotes the opinion of the Board of Revenue in 1892 as follows:—"Briefly, the system, as it at present exists rests on the claims of the mirasidars to all the waste lands in

1. (1916) I. L. R. 40 Mad. 410=32 M.L. J. Supp. 1.
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their villages and to the levy of Swatantram or fees from Payakarees or non-mirasidars who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876—78 (*Vide* G. O., dated 15th February 1876, No 221) and after full consultation with the mirasidars, a memorial fee (swatantram), fixed at an average rate of 2 annas on every rupee of Government assessment, was declared to be leviable by the mirasidars not only on every field lying waste in each village, but also on all lands now held by the mirasidars themselves and included in their pattas, should such lands be subsequently relinquished and taken up by a non-mirasidar. The fee claimable on each field was duly entered in the settlement register against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or patta from Government." Then the learned Judge refers to the Government orders passed on the 19th October 1909 about Swatantrams as follows:—" The right of the mirasidar to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands has been recognised by Government except in the case of the undermentioned fields which are free of swatantrams so long as they are held under the terms of the original grants." Next he refers to *Sakkaji Rau* v. *Latchmana Gaundan* [1] in which it was held that " where the right was denied, there should be enquiry whether, by custom, it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood. " In the result. following the decision in *Sakkaji Rau* v. *Latchmana Gounden* [1] which was recognised as good law by the Judges who decided the above Full Bench case, we held that where (as in this case) the tenant denies the right of the mirasidar to thunduwaram, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues,"

After thus indicating our opinion that the custom of paying thunduwaram when set up by the mirasidar is one to be proved by the mirasidar by adducing proofs of instances of levy of such fees in his own estate and similar estates in the neighbourhood, we sent back the records to the District Court for fresh findings on issues

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1 and 2, pointing out some of the errors which, in our opinion, occurred in the judgment of the District Judge. The issues 1 and 2 are as follows ?

1. "Whether the plaint, agreement Exhibit. B, bears no consideration.

2. Whether the plaintiff is entitled to the dues claimed even apart from the agreement ?"

On remand, the case was heard in the District Court by another District Judge (Mr. Venugopala Chetty) and he recorded findings against plaintiff, his material conclusions being as follows :—

(*a*) In the Settlement Register, Exhibit J of 1878, swathanthram fee due to the mirasidar is entered only in respect of some fields, namely, Nos. 5, 6, 20, 22, 24, 46; 48 and 129 in the plaint B Schedule, (which relates to dry lands in defendant's patta), Against 114 B in that same schedule, the remark in the settlement register is that no swathanthram is due until the land was relinquished, that is, until it was given up by the then pattadar and taken up by another. Against the wet lands in the A Schedule, no swathanthram fee is entered in the appropriate column as due to the mirasidar. "The settlement register must be regarded as a record of rights showing how far Government was prepared to recognise the claims of the mirasidars." "The ryots knowing as they did that there was a conflict between the mirasidar and the Government, would have naturally refrained from paying all the dues claimed by the mirasidar. The settlement register coupled with the oral evidence shows that there was interruption in the enjoyment of the mirasidar's right to thunduwaram. There is no evidence that the mirasidar has attempted to enforce his right in a Court of Law during all these years. Under these circumstances, the interruption raises a presumption against the existence of the custom."

(*b*) Exhibits L and Ll of the year 1826 relate to litigation between the plaintiff's grandfather and certain maniamdar (not sukhawasi tenants). Though the plaintiff's predecessor's right to collect thunduwaram and other mirasi dues was recognised therein, the dispute there was not between the mirasidar and the sukhavasi ryots and the question of the right to collect mirasi dues was not formally adjudicated upon by the Court. (Though

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the District Judge does not expressly say that these ancient documents of 1826 are therefore not of much value, he evidently means to suggest it).

(c). The documents Exhibits C2 to C15 beginning with 1864 are debt bonds executed to the mirasidar by sukhavasi tenants. Some of them are for arrears of village *Adaya* income and others expressly state that they are debt bonds for arrears of thunduwaram. "It is possible that they refer only to lands leased by the mirasidar." "The practice in the case of such lands cannot be invoked in proof of a customary right to mirasi dues from tenants introduced by the Government." (The reasoning in this part of the learned District Judge's judgment is not quite clear, but he evidently means that as the Settlement Register, Exhibit J, does not mention the swathanthram fees with reference to most of the plaint lands, the defendant's predecessor in title must be deemed to have been a tenant introduced to those lands by the Government and a customary right to collect mirasi dues from such lands can only be proved by evidence of payment made specifically for such lands.)

(d). As regards Exhibits F and G, Exhibit F was a statement prepared by the then kurnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it as is clear from the Settlement Register, Exhibit J, not much importance can be attached to it. As regards Exhibit G, it is not signed by any one and does not convey any information as to what lands are included in it and it is therefore doubtful whether it included also lands not *included in the mirasidar's patta* (that is, lands for which Government issued pattahs directly to the tenants.)

(e). Exhibits E, H and K, (two of them executed to the defendant himself) no doubt refer to the right of the mirasidar to receive melwaram thundu from certain lands in the village. They are of the years 1885, 1887 and 1889, long after the settlement register, and though in the settlement register Exhibit J, swathanthram is not entered against the lands mentioned in these mortgage deeds, the right of the mirasidar is acknowledged in these documents. The District Judge, however, held that there was "considerable force in the defendant's argument that these documents are not sufficient to prove a general custom, especially as they relate only to a small extent of the lands."

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(*f*) As regards B and D series, Exhibit B being the plaint agreement executed by the defendant himself in 1905 and the other Exhibits, agreements, taken from other tenants, though attested by the defendant himself, the District Judge thinks that no importance should be attached to these documents of 1905 as they were "recent."

(*g*) Then the District Judge refers to some documents on defendant's side on which it was argued that the omission to expressly mention thunduwaram in those documents was against the plaintiff's claim and to the fact that no thunduwaram has been collected for several years before suit. (The question whether Exhibit B was supported by consideration or not is so closely interwoven with the question whether the mirasidar has a right by custom to recover thunduwaram that it might be said to stand or fall with it. As regards the rate of the thunduwaram, the District Judge decided that if the plaintiff was entitled to it at all, he was entitled at the rates claimed by him).

Mr. Govindaraghava Aiyar, the learned Vakil for the appellant, strenuously contended (*a*) that he was entitled to argue on the whole evidence adduced as to custom just as if it were a question of fact the finding on which might be attacked in a regular appeal preferred to this Court, (*b*) that even if he was bound to accept particular facts and pieces of evidence which the lower Court held to be not established as false or conclusive he was entitled to argue that on the facts held to be established and the pieces of evidence accepted as genuine by the District Judge, the District Judge ought to have found as a matter of law that the custom set up by the plaintiff was established, (*c*) that the learned District Judge was mistaken in his statement that Exhibit G is not signed by any one and (*d*) that he was not justified in making a distinction between the right to collect mirasi dues from tenants introduced by the Government and tenants introduced by the mirasidar and in rejecting the evidence indicating the collection of thunduwaram on the mere ground that it was not specifically shown that that evidence related to the former class of lands.

I shall deal now with the first question, namely, that as this second appeal relates to a question of custom we are entitled to consider the whole evidence ourselves including the evidence which was not believed by the District Judge to be true or genuine. As

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I said in the very beginning I do not intend to deal finally with any of these questions as I have considered it advisable that the whole case should be decided by a larger Bench.

In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*[1] Sir S. Subramania Aiyar, Officiating Chief Justice, and Boddam, J. refer to *Hanumantamma* v. *Rami Reddi* [2]; *Mirabivi* v. *Vellayanna*[3] and *Vishnu* v *Krishnan* [4] (the last of which was decided by a Full Bench) as establishing that a finding as to the non-existence of an alleged local custom could be revised by the High Court on second appeal *on the evidence*. They then refer to the language of S. 584 of the old Civil Procedure Code, [corresponding to the present S. 100 *(a)*] which contains the words "the decision being contrary to (some specified) law *or usage having the force of law.*" The learned Judges then continue "This language is so explicit as to render superfluous the seeking for the reason of the provision though that is not difficult to discover, *viz.*, that a usage of the kind mentioned, being in its nature such as must necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (See Pollock and Maitland's History of English Law, 1st Edition, Vol. 1, p. 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course, it is otherwise in this country where from the days of Manu it has been laid down that "custom is transcendent law." It is clear, therefore, both upon authority *which is binding upon us as the opinion of a Full Bench* and as the right interpretation of the provision in question of S. 584 of the Civil Procedure Code, that, though the section disallows a Second Appeal with reference to findings of facts, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.,) required to constitute a valid usage having the force of law, *but also the credibility of the evidence relied on and*

1. (1905) I. L. R. 29 M. 24=16 M. L. J. 8.
2. (1881) I. L. R. 4 M 272.
3. (1885) I. L. R. 8 M. 464.
4. (1883) I. L. R. 7 M. 3 (F. B.)

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*the weight due to it.*" "*Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage.*" Thus according to this decision even the credibility of pieces of evidence adduced in support of local usage can be considered by the High Court on Second Appeal. In *Mahommad Meeran Bibi* v. *Sheik Mahamad Rowther* [1], Spencer and Phillips, JJ., have held that the question whether the parties in a suit are governed by the Hindu or Mahomedan Law is a question of fact and does not relate to any usage having the force of law. The parties in that case were Mahomedan Labbais of the Trichinopoly District. It seems to me fairly arguable with the greatest respect to the above decision, that the question whether the local usage among these Labbais had the force of a law which made their rights of succession governed by the rules of Hindu Law comes under S. 100 of the Code of Civil Procedure though the rules of both the Hindu and Mahomedan laws always have the force of law. (The learned Judges refer to a prior decision in *Kunhambi* v. *Kalanthar* [2], decided by Tyabji and Spencer, JJ.). The most recent case which I have come across in this Court (decided in November 1916 is decided in *Pankajammal* v. *The Secretary of State for India* [3] by Ayling and Seshagiri Aiyar, JJ. That related to the custom as to the order of succession of trustees of a particular Kattalai in the Conjeevaram temple. The following observations occur: "Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandrier who came in at a later stage of the case conceded that this contention is not supported by authority. The learned Vakil argued that a question whether on the facts as found, the Courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below and that the High Court *would not be justified in weighing the evidence*, as if it were sitting to hear a first appeal." "It is open to doubt whether the

1. (1917) M. W. N. p. 98. 2. (1914) 27 M. L. J. 166.
3. (1916) 32 M. L. J. 257.

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expression, ' a usage having the force of law' in section 100 (a) of the Civil Procedure Code, should not be confined to the usages of the country or of the community as suggested by Petheram, C. J. in *Nivath Singh* v. *Bhikki Singh* [1]. Customs like pre-emption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865, seem to have been in the contemplation of the legislature. It seems doubtful whether a private right, like the one we are considering, falls within section 100 clause (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal ". I must, however, say that the decision of this Court in *Kakarla Abbayya* v. *Raja VenkataPapayya Rao* [2] following the Full Bench decision in *Vishnu* v. *Krishnan* [3] not adverted to by the learned Judges who refer to the case in *Nivath Singh* v. *Bhikki Singh* [1] which seems to have never been followed in this Court as law. I shall now refer to a very recent decision of the Privy Council in *Palaniappa Chetty* v. *Daivasikamony Pandarsannadhi* [4]. There a custom of granting permanent leases of the property of a particular temple was set up. Their Lordships of the Privy Council say at page 13 : " It has, however, been pressed on behalf of the appellants that there are two findings one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt, two findings upon question of pure fact must be accepted, by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact ; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a *question of law—not fact*" I think that this case gives to the expression "local usage" a much wider meaning than Sir C. Petheram, C. J. was inclined to allow in the case of *Nivath Singh* v. *Bhikki Singh* [1]. I shall now turn to the case of *Kailas* v. *Padmakisor* [5] decided in April 1917. Here Mookerjee, J. reviews the authorities, dissents from *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] and *Vishnu* v. *Krishnan* [3]. and sums up as follows : " But this does not

1. (1885) I. L. R. 7 All. 649 (F.B.) 2. (1905) I. L. R. 29 M 24.
3. (1883) I. L. R. 7. M. 8 (F.B.) 4. (1917). 33. M.L. J. pages 1 at 18.
5. (1917) 25 C. L. J. 613.

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entitle the High Court in Second Appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, *though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law.* The substance of the matter is that while the question *whether a given state of facts established a binding custom or usage is a question of law,* the question whether such a state of facts has been proved by the evidence is a question of fact." In this conflict of authorities, in view of the facts that *Vishnu* v. *Krishnan* [1] was decided, by a Full Bench of this Court consisting of four very learned Judges (Turner, C. J., Innes, J., Kindersley, J., and Muthusami Aiyar, J.) and was followed in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] and having in view the fact that this question of mirasi rights is reaching its final stage, I think that not only the mere questions of law (namely, whether the High Court in Second Appeal can go into the credibility of the evidence, whether it can consider the weight to be given to the evidence which is believed by the Lower Appellate Court and whether the evidence taken as a whole is legally sufficient to establish the custom and the legality and binding force as law of the custom &c.,) but even the decision of the whole matter might be left to a larger Bench.

The Appellate Side Rules of the High Court, page 3, Rule 2 says " The following matters shall ordinarily be heard and decided by two Judges," and then among the matters are mentioned " appeals from the decree of a Civil Court " which I take it includes a Second Appeal. So, a Second Appeal is treated as one of the "matters" to be heard by a Bench of two Judges. Then it says "provided both Judges agree that the determination involves a question of law, they may order that the *matter*, or the question of law, be referred to a Full Bench". I think that this empowers us to refer not only a question of law but the whole "matter" of the Second Appeal to a Full Bench. If a question of law alone is referred, then Rule 3 (page 4) would apply and the " matter " (or the case) would ultimately come back to us.

I have thus dealt with the contentions (*a*) and (*b*) of Mr. Govindaraghava Aiyar. As regards contention (*c*) about the learned District Judge's alleged mistake in his statement that Exhibit G is not signed by any one, Mr. Govindaraghava Aiyar has not

1. (1883) I. L. R. 7 M. 3. 2. (1905) I. L. R. 29 M. 24.

printed the whole of Exhibit G and I think it is better to leave it to the Full Bench to decide whether they would allow him to have it printed in order to prove his contention.

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As regards the last contention (d), I think there is much force in his argument that the District Judge ought not to have rejected the evidence afforded by Exhibit C series on the ground that such evidence is valueless unless it was shown to specifically relate to lands granted by Government. I am also inclined to hold that the Government's non-recognition in the Settlement Register of the mirasidar's right to collect swatantrams from such lands cannot be said to detract in any appreciable manner from the weight of the other evidence relating to the mirasidar's right by custom to collect such dues having regard to the history of the mirasi tenure rights and to the fact that the Government has been trying to gradually restrict such rights. I might also state that as at present advised (assuming that this Court is entitled to weigh the evidence,), I should be inclined to hold that the learned District Judge has not given sufficient weight to Exhibits E, H, K, B and the old legal records Exhibits L and LI. (I would accept the rate of thunduwaram found by the District Judge if the plaintiff is held entitled to collect thunduwaram). I am inclined further to doubt very much the soundness of the view of the District Judge that even as regards the plaint lands, fields Nos. 5, 6, 20, 22, 24, 46, 48 and 129 which are specially mentioned in the Settlement Register itself as liable to pay Swantantram fee to the mirasidar, the custom set up should be held to be not proved because the custom is not (in the learned Judge's view) proved as regards the other lands also and because there has been an interruption for several years. However, as I said, I would, having regard to the difficulty and importance of all the questions involved, refer the whole matter to a Full Bench.

Phillips, J.

*Phillips, J* :—This suit was remanded for a finding on several issues the most important of which is issue No. 2 "whether the plaintiff is entitled to the dues claimed even apart from the agreement." The dues claimed consist of what is called *tunduvaram*, and the plaintiff alleges that, as mirasidar, he is, according to custom, entitled to levy those dues from the defendant. The District Judge has tried the issue and has found that no custom has been proved to exist under which the plaintiff is entitled to

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make this claim. This finding is a finding on custom and it is now sought to impeach it upon the evidence.

No doubt, a question of the existence of a custom is a question of mixed law and fact, and under section 100 of the Code of Civil Procedure, a second appeal may lie to the High Court on the ground that the decision is contrary to law or to some usage having the force of law. The question of custom has been repeatedly considered and it has been held that the question of the mere existence of a custom is a question of fact (*Vide Hurechur Mookerjee* v. *Judoonath Ghose* [1]; and *Syud Ali* v. *Gopal Doss* [2]) and this has also been the view of the Judicial Committee in *Muhammad Kamil* v. *Imtiaz Fatima* [3] and in *Anant Singh* v. *Durga Singh* [4]. In *Ramratan Sukal* v. *Nandu* [5] it was held by the Judicial Committee that, "no Court of Second Appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of First Appeal, and if there is evidence to be considered, the decision of the Court, however unsatisfactory it might be, if examined, must stand final." In *Ramgopal* v. *Shamskhaton* [6] this principle was approved, although it was held that in that particular case, which related to a custom, the facts found need not be questioned, but the soundness of the conclusions from them was in question and that was a matter of law. In *Mohesh Chunder Dhal* v. *Satrughan Dhal* [7] it was held that the question of the existence of a custom of lineal primogeniture as the rule of succession was a question of fact. In *Kunhanbi* v. *Kalanthar* [8] it was held by this Court that "whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognised is a question of law, but the question whether the custom exists and if it exists, it applies to a particular person or set of persons is a question of fact," and this seems to me to correctly describe the principle laid down by the Judicial Committee in the above cases. In the present case, the question that has to be decided is whether the plaintiff is entitled to collect tunduvaram from the defendant, the right claimed being based upon an alleged custom. The existence of this custom in certain places has been held to be

1. (1868) 10 W. R. 153.
2. (1870) 13 W. R. 420.
3. (1909) I. L. R. 31 All 557.
4. (1910) I. L. R. 32 All. 363.
5. (1891) I. L. R. 19 Cal. 249.
6. (1892) I. L. R. 20 Cal. 93
7. (1901) I. L. R. 29. Cal. 343.
8. (1914) 27 M. L. J. 156.

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true and the right has been held to rest in certain mirasidars as such. The Full Bench decision in *Seshachela Chetty* v. *Chinnasami* [1] has recognised this customary right of levying *tunduwaram* but the Court was of opinion that its existence in any particular case was a matter of proof. When, therefore, it is not a question as to whether a certain set of circumstances forms a custom having the force of law, but where the question is whether a custom which has already been recognised by Courts as having the force of law exists in a particular locality or between particular parties, it seems to be a question of fact, and if the matter were *res integra* I should feel inclined to hold that the present finding of the District Judge to which exception has been taken, is a finding of fact with which this Court cannot interfere in second appeal. In *Kakarla Abbaya* v. *Raja Venkata Papayya Rao* [2] however, it was held that when the finding was as to an alleged local custom, the finding could be examined in Second Appeal and a conclusion arrived at. The decision was based upon the decisions in *Hanumantamma* v. *Rami Reddi* [3], *Vishnu* v. *Krishnan* [4] and *Mirabivi* v. *Vellayanna* [5] in all of which cases a question of custom has been considered by this Court in Second Appeal, but in which the contention had not been put forward that such a question could not be raised in Second Appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] this Court went, as it seems to me, considerably further than the dictum laid down by the Privy Council in *Ramgopal* v. *Shamskhaton* [6] which was that the facts found need not be questioned but the question of the soundness of the conclusion arrived at was a matter of law, for it held that where the existence or non-existence of a usage having the force of law was in question " it is the duty of this Court to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it." If this be accepted as correct law, a court in Second Appeal would be bound to examine the whole evidence relating to an alleged custom and to see what weight is to be attached to each particular portion of it, and decide whether the evidence was reliable

1. (1916) I.L.R. 40 M. 411.
2. (1905) I.L.R. 29. M. 24=16 M.L.J. 8.
3. (1881) I. L. R. 4 M. 272.
4. (1883) I. L. R. 7 M. 3.
5. (1888) I. L. R. 8 M. 414.
6. (1892) I. L. R. 20 Cal. 13 (P. C.)

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and witnesses worthy of credit. This appears to be somewhat inconsistent with the usual understanding that in a finding of fact upon the evidence, the Lower Appellate Court's decision is final; and in *Kailas* v. *Padmakisor* [1], *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] has been expressly dissented from. In a recent case in *Pankajammal* v. *The Secretary of State for India* [3] another Bench of this Court remarked that the contention put forward that, in all cases where evidence as to custom had been let in, the Court was bound to weigh such evidence and decide upon the materials was not supported by authority but apparently the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] was overlooked. The learned Judges proceeded to say that the question whether, on the facts as found, the Courts below were justified in saying that the custom had not been proved was a point on which the High Court was entitled to draw its own inference, and that is in accordance with the abovementioned dictum of the Privy Council in *Ramgopal* v. *Shamskhaton* [4]. In *Palaniappa Chetty* v. *Daivasikamoney Pandara Sannadhi* [5] the Judicial Committee also remarked that "questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then of determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact". If we apply this principle to the present case it would appear that the finding that the custom of levying *tunduwaram* does not exist as between plaintiff and defendant is a finding of fact. In view, however, of the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [2] I agree that it is advisable that the question should be submitted to a Full Bench, and, as my learned brother wishes to refer, not an abstract question, but the whole of this case, I concur.

*L. A. Govindaraghava Aiyar and D. V. Neelamegha Chariar*, vakils for the Appellant.

*T. R. Ramachandra Aiyar*, vakil for the Respondent.

The Court delivered the following

Wallis, C. J.

**Judgments** : *Chief Justice*:—As regards the question of law referred to us I am of opinion that the decision in *Kakarla*

1. (1917) 25 C. L. J. 618.
2. (1905) I. L. R. 29. M. 24.
3. (1916) 32 M. L. J. 237.
4. (1892) I. L. R. 20 Cal. 99.
5. (1917) 33 M. L. J 1.

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*Abbayya* v. *Raja Venkata Papayya Rao* [1] must be overruled. In the cases to which Sir Charles Turner was a party the Court no doubt examined the evidence in detail to see if it was sufficient to support the custom, but in no case did they interfere with the findings except in *Mirabivi* v. *Vellayana* [2] and thereafter referring to the findings they observed that the question before them was "whether there is evidence on which such custom could reasonably have been found to exist". They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No question of the limits of the Court's right of interference in second appeal was raised or decided in these cases. As regards *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [1] I am unable with great respect to agree with the observations of Subramania Aiyar, J. as to the effect of the words " usage having the force of law" in that section. This section has a long history going back to the days of the Sudder Court. Act XVI of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the Subordinate Civil Courts " 1st on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law". Under that section, as under this, where one of the material points in the case is the existence of a custom, that, as the Privy Council has recently laid down, is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the Subordinate Court had determined it " contrary to law or usage having the force of law", and not, also, as in ordinary appeals, on the ground that the Subordinate Court had determined the point contrary to the weight of the evidence. The words "usage having the force of law" in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. This section was reproduced in the successive codes of Civil Procedure with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of Ayling and Seshagiri Aiyar, JJ. in *Pankajammal* v. *The Secretary of State for India* [3], and of Mookerjee and Beachcroft

1. (1905) I. L. R. 29 M. 24. 2. (1885) I. L. R. 8 M. 464
3. (1916) 32 M. L J. 287.

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JJ. in *Kailas* v. *Padmakisor* [1] where all the cases are exhaustively reviewed, take the same view.

Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom, but uses the fact that swatantrams are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the Settlement Register of 1878 that the lands in B schedule were liable to pay swatantrams. This is a strong instance of the assertion of the right on the estate and entitled to great weight, while on the other hand the refusal of the Settlement Officers to register the swatantram as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exhibits E, H and K. the District Judge finds that they indicate a right to tunduwaram even in suit lands against which no swatantram is entered in the register but observes they relate only to a small extent of land. Lastly we come to the documents Exhibit B in which the defendant agrees to pay swatantrams and Exhibit D series to the same effect which were taken from the other tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay swatantrams is a well known incident of mirasi tenure in Chingleput; but, as it is not universally applicable, it has been held by the Full Bench in *Sakkaji Rau* v. *Latchmana Gaundan* [2] that it is for the mirasidar to show that he is entitled to enforce it "by the custom of the estate or the neighbourhood." The above findings of fact by the District Judge are in my opinion sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.*—I confess that I have felt great hesitation in arriving at a conclusion on the question whether in Second Appeal the High Court has got a right to itself examine the evidence with reference to which the finding of the District Judge on the issue of custom was given. On the one side, there are the decisions of this Court in *Hanumanttamma* v. *Rami Reddi* [3], *Vishnu*

1. (1917) 25 Cal. L. J. 613.   2. (1880) I. L. R. 2 M. 149.
3. (1881) I. L. R. 4 M. 272.

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v. *Krishnan* [1] *and Mirabivi* v. *Vellayanna* [2] where, several learned Judges of this Court (including Sir Charles Turner, C. J. and Muthusami Aiyar, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. Subramania Aiyar, (Officiating Chief Justice) in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [3], that "it is impossible to believe that the learned Judges who decided" those cases "overlooked so obvious an objection." In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao,* Sir S. Subramania Aiyar (Officiating Chief Justice) and Boddam, J. directly decided that whatever may be the English law, where a question of "usage having the force of law ," is concerned, the High Court in Second Appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In *Kailas* v. *Padmakisor* [4], that very learned Judge Sir Ashutosh Mukerjee who was one of the Bench which decided the case very exhaustively deals with the question and I shall extract from that judgment the material conclusions arrived at therein.

(1) "The question of the existence of an alleged custom is a question of fact".

(2) The finding of the lower Appellate Court "is liable to attack on the ground that irrelevant evidence has been received" "or that relevant evidence has been excluded".

(3) "also on the ground that there is no evidence of the alleged custom" or "that the finding is based on *legally insufficient evidence* " " or that " the facts found do not constitute evidence of the alleged custom ".

(4) also " on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom", "or has overlooked the distinction between a custom and a usage".

(5) "consequently, the question whether the *facts found prove* the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal.

I am naturally very loth to differ from the opinion of Sir S. Subramania Aiyar, J. especially as he gives very cogent reasons

1. (1883) I. L. R. 7 M. 3. 2. (1885) I. L. R. 8 M. 464.
3. (1905) I. L. R 29 M. 24. 4. (1917) 25 C. L. J. 613.

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for his conclusion in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [1] but I think that there are certain dicta of their Lordships of the Privy Council which are more binding upon me. In *Ramgopal* v. *Shamskhaton* [2] their Lordships quote their own decision in *Ramratan Sukal* v. *Nandu* [3] and lay down as regards construction of sections 584 and 585 of the old Civil Procedure Code (re-enacted practically in the same terms in the new code) that "it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of *findings of fact* by the second Court; and if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final." Now, the findings as to *instances* of usage, as to the genuineness of documents put forward as regards usage and the credibility of witnesses are clearly *findings of fact.* But as pointed out by their Lordships of the Privy Council themselves in *Palaniappa Chetty* v. *Daivasikamani Pandara Sannadhi* [4] the Judge's findings as to "what were the things *actually done* in alleged pursuance of custom" may be findings of fact but whether the facts so found satisfy the requirement of the law is a question of law. The decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*[1] is not expressly referred to in *Pankajammal* v. *The Secretary of State for India* [5]. Mr. T. R. Ramachandra Aiyar who appeared in the latter case assures us that (*Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [1] was in the minds of the learned Judges who decided the latter case and that it was quoted to them. Of course I accept his statement. The position laid down in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* [1], namely, that the evidence can be gone into in detail in the High Court in Second Appeal is characterised in the judgment in *Pankajammal* v. *The Secretary of State for India* as an "extreme contention." The learned judges proceed to say that " the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below." They again indicate their inclination to the view that the usage having the force of law mentioned in S. 100(*a*) of the Civil Procedure Code should be confined to the usages referred to by Pethe-

1. (1905) I. L. R. 29 Mad. 24.
2. (1892) I. L. R. 20 Cal. 93
3. (1891) I. L. R. 19 Cal. 249.
4. (1917) 33 M. L. J 1 at p. 18.
5. (1916) 32 M. L. J. 237.

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ram, C. J. in *Nivath Singh v. Bikki Singh* [1]. While the reliability of evidence let in is for the lower Appellate Court, I think (with the greatest respect) that the value to be attached to the evidence (provided it is not mere "opinion" evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. As regards the observations of Petheram, C, J. in *Nivath Singh* v. *Bikki Singh* [1] they have been expressly overruled by their Lordships of the Privy Council in *Ramgopal* v. *Shamskhaton* [2]. However, as I said already, I feel (though after some hesitation) that I should follow the principles laid down in *Kailas* v. *Padmakisor* [3] in preference to the conclusions in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*[4] as the former decision seems to be more in consonance with the dicta of the Privy Council in *Ramgopal* v. *Shamskhaton* [2] and in *Muhammad Kamil* v. *Imtiaz Fatima* [5] and in *Anant Singh* v. *Durga Singh* [6].

In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and validity of the custom. I am inclined also to hold that we are entitled under section 103 of the Civil Procedure Code to go into the genuineness of the documents in Exhibit C series (except C 1), the District Judge, in my opinion, having not given a finding about the genuineness of these documents (except C 1) and I would find that they are genuine. They strongly corroborate the other evidence as to custom.

Further, the document Exhibit B executed by the defendant is a clear admission of the existence of the custom in 1905 and of defendants' liability to pay thunduwaram according to that custom. Their Lordshps of the Privy Council in *Chundra Kunwar* v. *Chaudhri Narpat Singh* [7] quoting from English

1. (1883) I L. R. 7 All 650,
2. (1892) I L. R. 20 Cal. 93 at p. 99.
3. (1917) 25 C. L. J. 613
4. (1905) I. L. R. 29 M. 24.
5. (1909) I. L. R. 31 All. 557.
6. (1910) I. L. R. 32 All. 363.
7. I. L R. 29 All 194, 195 (P. C.)

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cases state "What a party himself admits to be true may be reasonably presumed to be so". "The express admissions of a party to the suit are evidence, and strong evidence against him." No explanation was given by the defendant from the box as to his admission in Exhibit B and "unless and until he explains such admission" "the fact admitted *must be taken to be established*" (page 195) The lower Courts merely argue in a circle when they find that Exhibit B has no consideration because the liability by custom to pay thunduwaram is not established. Further the lower Courts have ignored the consideration that as regards the right to thunduwaram, the mirasidar has a far less heavy burden to discharge than when he lays claim to Natham Poramboke lands etc. (See judgments in the Full Bench case in *Seshachala Chetty* v. *Chinnasami* [1].

I therefore agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

Kumarasami Sastri, J.

*Kumaraswami Sastri, J:*— I agree with the conclusions arrived at by my learned brother Sadasiva Aiyar, J. and have nothing useful to add.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

Thema and another ... *Appellants* (Plaintiffs).*

*v.*

Kunhi Pathuma and another ... *Respondents (Defendants).*

Thema v. Kunhi Pathuma.

*Customary Law—South Canara—Kuzhikanam lease—Lessee in possession after expiry of the term—Right to improvements— Possession of lessee, not adverse —Notice to quit, if necessary.*

Under the customary law of South Canara, as in Malabar, a *Kuzhikanam* lessee is entitled to remain in possession of the demised land after the expiry of the term, until he is paid the value of his improvements. Such possession is not adverse to the lessor or persons claiming under him. Where a kuzhikanam tenant continues in possession after the expiry of the term awaiting the payment of compensation, he is not entitled to a notice to quit unless he is holding over as a tenant, with the consent of the landlord.

Second appeals against the decree of the Subordinate Judge of South Canara in A. S. Nos. 50 and 51 of 1916, preferred against the decrees of the District Munsif of Kasargod, in O. S. Nos. 426 and 427 of 1914 respectively.

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* S. A. Nos. 1504 and 1506 of 1916. 20th March. 1917.

1. (1916) I. L. R. 40 M. 410 at p. 478, 487 and 522.

Thema v. Kunhi Pathuma.

The Karnavan of a tarwad which owned the suit properties granted a *kuzhikanam* lease of the same for a term of 15 years commencing from 6-8-1885, in favour of the predecessor-in-title of the first defendant. The first defendant continued in possession of the suit properties even after the expiry of the term. On 22-7-1914 plaintiff, a subsequent usufructuary mortgagee of the suit lands, brought two suits for recovery of possession of the said lands alleging that on 7-3-1914 he had given notice to the first defendant to quit and offering to pay him the value of his improvements. The suits were decreed by the first court but on appeal the Subordinate Judge reversed the decrees and dismissed the suits on the grounds that they were barred by limitation and that the notice to quit was not a reasonable notice. Plaintiff appealed.

*J. L. Rozario* for the Appellants.

*C. Madhavan Nair* for the Respondents.

The Court delivered the following

**Judgment** :—The Subordinate Judge is wrong on both the points decided by him. There can be no question of adverse possession in favour of the defendant, because under the customary law of Malabar, the *Kuzhikanom* lessee is entitled to remain in possession until he is paid the value of the improvements.

In this respect, the law is the same in South Canara : *Daramma* v. *Mariamma* [1]. It is true that S. 5 of the Malabar Compensation for Improvements Act does not in terms apply to South Canara but as was pointed out in *Kunmatha Vittil Kutti Kuthali* v. *Rev. Antoni Goveas* [2], that section only embodies the customary law of Malabar and South Canara. Consequently on the expiry of the period fixed, the tenant does not become a trespasser. The decision in *Subraveti Ramiah* v. *Gundala Ramanna* [3] quoted by the Subordinate Judge has no application to Malabar *Kuzhikanom* tenants. We must therefore hold that the defendant has not acquired a title by prescription.

On the question of the reasonableness of the notice to quit, we think that under the law, a tenant who remains on the land awaiting the payment of the compensation to him is not holding over as a tenant. S. 5 of the Malabar Compensation Act says that he is entitled to remain on the land, *notwithstanding the fact that*

1. (1898) 24 M. L. J. 397. 2. (1913) M. W. N. 889.
3. (1909) I. L. R. 33 M. 260.

Thuma v. Kunhi Pathuma.

*the tenancy has determined*; therefore his possession is not by virtue of a tenant's right, but because there are monies due to him which have to be ascertained and paid. In the present case the period of lease was fixed, and on the expiry of that period, the tenancy came to an end. We have not been referred to any evidence showing that the landlord assented to the continuance of the tenancy. Mr. Madhavan Nair strongly relied upon a decision of this court in S. A. Nos. 771 to 773 of 1914. In that case it was found that the tenant made a yearly payment. Moreover the period of the tenancy was not fixed. We do not think that decision compels us to hold that when a period is fixed and there is no subsequent assent by the landlord, the quondam tenant is entitled to any notice.

Such suits should be regarded as practically suits for redemption. The court should on ascertaining the value of the improvements fix a time within which the compensation will have to be paid and pass a decree directing surrender on the expiry of that period.

We reverse the decree of the lower Appellate Court, direct it to get the improvements re-valued, to a fix a time for payment and to pass a decree for surrender on the expiry of that period. The tenant in possession is bound to give credit to the plaintiffs for the rent reserved. This will be done in taking the accounts. Costs will abide the result.

A. V. V.

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## PRIVY COUNCIL.

PRESENT: — LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI, AND SIR WALTER PHILLIMORE, BART.

[On Appeal from the High Court of Judicature at Madras.]

Sri Sethuramasvamiar and others ... *Appellants**

*v.*

P. C.

Sri Sethuramasvamiar v. Sri Merusvamiar.

Sri Merusvamiar and others ... *Respondents.*

*Hindu Law—Grants for charitable purposes—Private charities—Devolution of the right of management—Rule where the grant itself is silent.*

The general rule of Hindu law is that the right of management of private charities passes to the natural heirs of the original grantee, and if there is no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing members of the family before partition or in turn by the several heirs after partition.

* 13, 16 and 17th July, and 23rd October, 1917.

P. C.

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But this rule does not apply (1) when there is an express provision to the contrary in the original grant, or (2) when there is a sufficient indication in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the founder's purpose.

A Hindu sovereign granted certain lands to S. his guru or spiritual preceptor, some without condition, and others for specified religious purposes. The original guru's descendants in regular succession filled his office and enjoyed and managed the lands. The Raj was escheated. The then guru, who was the first to leave more than one son, subsequently died leaving three sons. The eldest of the three was installed as guru. Thereafter one of his younger brothers sued for a share in the non-religious properties and in the management of the religious properties.

*Held*, that as regards the non-religious properties there was nothing to take their descent out of the ordinary rule of inheritance, and that plaintiff was entitled to partition: but that as regards the religious properties it was the founder's intention that they should be administered by the guru as head of a *mutt*, an office not divisible among the members of a family, and this being so, the Indian Courts had no jurisdiction to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

*Jafar* v. *Aji* [1], and *Trimbak* v. *Lakshman* [2], approved.

Appeal from a decree of the Madras High Court, dated August 18, 1909, affirming a decree of the Subordinate Judge of Tanjore.

The facts of the case are sufficiently stated in the judgment of their Lordships and in the report of the High Court proceedings in *Sri Sethuramaswamiar* v. *Meruswamiar* [3]. The first respondent sued his elder brother (the appellant) and his younger brother (the second respondent) and others on the allegations that the three brothers formed a joint family governed by the Mitakshara, that the properties in suit were joint family properties, and that he was entitled on partition to one-third share of such properties except those devoted to religious and charitable purposes, as to which, he was entitled equally with his brothers to take part in the management. Appellant resisted the claim contending that succession was governed by primogeniture but that anyhow he alone was entitled to manage the properties devoted to religious and charitable purposes. The Subordinate Judge decreed the suit and his decree was confirmed on appeal by the Madras High Court (Wallis and Sankaran Nair, JJ.)

Hence this appeal.

*Sir Erle Richards, K. C.*, and *J. M. Parikh* for appellant, submitted that the High Court had erred in construing the documents relating to the grants as sannads. The grants were made

1. (1864) 2 Mad. H. C. R. 19. 2. (1895) I. L. R. 20 B. 495.
3. (1909) I. L. R. 34 Mad. 470.

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orally: the documents in question were merely the Raja's orders to his officials. The properties in suit were given to the Guru from time to time to maintain the dignity of his office: they were not given to him personally, but as holder of an office. The first defendant, who is the guru for the time being, is exclusively entitled: the plaintiff has no right to partition. The case as to the religious properties is even stronger: such properties are always held by the *mutt* and managed by the head of the *mutt*, *i.e.*, one man. There is no question of ownership in this case: it is a matter of management, and plaintiff has no right to interfere.

It is admitted that the office of guru devolves by primogeniture, and this is material as showing that the property of the family devolves in the same way. There is a custom of gaddinashini, (installation) and this also points to primogeniture.

*Thakur Nitipal Singh* v. *Thakur Jai Singh Pal* [1], *Garudhwaja Parshad Singh* v. *Saparandhvaja Singh* [2], Mayne's Hindu Law, 8th Edition para. 469.

As to the action taken by the Government on the escheat of the Tanjore Raj with reference to properties like those in suit, vide *Secretary of State for India in Council* v. *Kamachee Boy Saheba* [3].

The fact that plaintiff accepted a fixed monthly allowance tends to show that he was excluded from enjoyment as a co-parcener of the property which he asserts to be joint: it negatives his right to partition: *Rai Raghunath Bali* v. *Rai Maharaj Bali* [4].

The religious properties were given to the original guru for specified purposes. He was then the head of a mutt which he had founded, and for over a century the properties have gone with the mutt and been managed by the head thereof. The headship of a mutt is impartible, and the property under the management of the head is therefore impartible. *Trimbak* v. *Lakshman* [5]. Mayne's Hindu Law, paragraph 439.

Plaintiff does not allege that he has any right to be head of the mutt, and cannot therefore claim any share in the management.

1. (1896) L. R. 23 I. A. 147, 151, 153, 156.
2. (1900) L. R. 27 I. A. 238, 250.
3. (1859) 7 M. I. A. 476.
4. (1885) L. R. 12 I. A. 112, 115.
5. (1895) I. L. R. 20 Bom. 495, 500, 501.

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The cases relied on by the High Court are distinguishable. In *Nubkissen Mitter* v. *Hurrichundun Mitter* [1], the question was as to a family idol: it was a private endowment. The endowment here was a public one, made by a sovereign ruler, and the rules as to the management of private endowments do not apply, *Trimbak* v. *Lakshman* [2].

In *Ramanathan Chetty* v. *Murugappa Chetty* [3], and *Thandavaroya Pillai* v. *Shunmugam Pillai* [4], it was admitted that on the death of the last sole trustee the office devolved on his heirs, so these cases cannot be authorities here; moreover, the question there was as to the management of a temple, while here it is as to the management of properties connected with a mutt.

If the Court had jurisdiction, a scheme providing for equal rights of management by all the coparceners would be detrimental to the interest of the charities themselves.

[Their Lordships intimated that they desired to hear respondents' Counsel as to the religious properties only].

*De Gruyther, K. C* and *Kenworthy Brown*, for respondents, submitted that the grants of the religious properties were made to Setubhava personally, subject to a charitable charge, and that the succession was governed by the ordinary rules of Hindu Law.

*Lahar Puri* v. *Puran Nath* [5]; *Gyana Sambandha Pandara Sannidhi* v. *Kandasami Tambiran* [6].

There was here no mutt or religious institution at all. The installation of the first defendant by other mahants was simply an honour paid to him: it has no legal significance.

Even if there is a mutt now there is no evidence that it existed at the time of the grants. The properties were at one time managed by the Court of Wards, which could not perform the duties associated with a mutt. Both Courts have held that the properties are not attached to the mutt. They are family properties charged with a religious trust, and pass to the grantee's heirs.

Mayne's Hindu Law, paragraphs 438, 439.

Reference was also made to *Ramanathan Chetty* v. *Murugappa Chetty* [3] affirmed in *Ramanathan Chetty* v. *Murugappa Chetty* [7].

1. (1818) 2 Morley's D. 146. 2. (1895) I. L. R. 20 Bom. 495, 500, 501.
3. (1903) I. L. R. 27 Mad. 192 : 13 M. L. J. 341.
4. (1908) I. L R. 32 Mad. 167 : 19 M. L. J. 59.
5. (1915) I L R. 42 I. A. 115. 6. (1886) I.L.R. 10 M. 375 at pp. 386, 387.
7. (1906) I. L. R. 33 I. A. 139=I. L. R. 29 M. 283=16 M. L. J. 265.

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*Sir Erle Richards, K. C.* in reply, referred to *Sathianama. Bharati* v. *Saravanabagi Ammal* [1] and submitted that the first defendant was in possession and that it was for plaintiff to prove his title to a share in the management.

Their Lordships' judgment was delivered (Oct. 23, 1917) by.

*Sir Walter Phillimore*:—The plaintiff in this suit is the younger brother of the first defendant, and the nature of his claim is two-fold.

He alleged, first, that there were certain joint family properties, of which the first defendant had been manager, and of which he now desired his share.

Secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the management of which he was entitled to share, and for which he desired that there should be a scheme of management settled by the Court.

The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

The properties, both non-religious and religious, were granted at various times by the then Rajah of Tanjore to the ancestor of the parties, one Setubavaswami. They descended to his son, and that son. having no natural children, to an adopted son, and then to his adopted son, Rama Sethuswami, who died, leaving three natural sons, *viz.*, the plaintiff and the first and second defendants.

At the time of the death of Rama Sethuswami in 1886 his three sons were minors. The first defendant came of age in 1890, and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Rajah of Tanjore. He was a holy man, who, somewhere about the year 1739, was brought from a mutt or religious institution at Mannargudi to Tanjore, and was constituted by the Mahratta Ruler of Tanjore his *guru*, or spiritual preceptor. His descendants in regular succession became *gurus* to the Rajah as long as the Raj remained, and were installed by the Rajah for the time being with certain ceremonies, one of the most important being the placing of the new *guru* on the *gadi*. There was also a religious

1. (1898) I. L. R. 18 Mad. 266. 270.

ceremony, in which the head of the mutt at Mannargudi and certain other heads of Mutts took part, to which reference will be made later on.

When Ramasetuswami, the father of the parties, died the Raj had escheated; but after the usual relegious ceremony had taken place, the man claiming to be the adopted son of the last Rajah installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the *guru* of the man who installed him.

The contention on behalf of the first defendant is that the office of *guru* is hereditary by way of primogeniture, and that the non-religious lands were given to the *guru* for the time being to maintain the dignity of his office, and are therefore impartible.

The contention for the plaintiff is that these lands were granted to the original *guru*, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of *guru*.

Shortly after the escheat of the Raj in 1855, enquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Rama Sethuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the Rajah, which would escheat upon the termination of the Raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants, and consequently had not escheated. Thereupon new *inam* grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office. The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a Royal Priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal *inams* of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit rent. In some of the grants the

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*inam* is said to be tax free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non-religious lands out of the ordinary rule of inheritance. This is what has been decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature of Madras upon Appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both Courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff, and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others.

This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family lands

The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food chattrum near the tomb of the holy man Meruswami, and in one case for the purpose of making an agrahar by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid down by various decisions in India, and apparently accepted in one case by the Privy Council (*Ramanathan Chetty* v. *Murugappa Chetty* [1]), is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the

1. (1903) I. L. R, 27 M. p. 192; (1906) L. R. 33 I A. p. 139.

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managing member of the family before partition, or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit.

The case most nearly in point is *Thandavaroya Pillai* v. *Shunmugam Pillai* [1], but it does not decide this question and does not seem to have come up before the Privy Council.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the Mahratta Rajah to Sethubavaswami, which take the form of orders to his officers, describe them as being for the purpose of *inam* and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the Royal Priest, Setubavaswami.

Having regard to the donee's position and the way in which these grants are set forth, it would be difficult if there was nothing else to guide the Court to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title-deed granted to the manager for the time being of the charity, which is then described. By the deed the title of the manager is acknowledged, and the *inam* is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking, as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands, any more than it was intended to vary the previous rules as to the descent of the non-religious

1. (1908) I. L. R. 32 M. p. 167.

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lands, these confirmation grants afford evidence as to the nature of the tenure, as it was commonly understood at the time. These lands, then, had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the *mutt*, or institution founded when the original *guru* was induced by the Rajah to migrate from Mannargudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new *guru* were of a double character. The induction, as it may be called, by the Rajah to the office of Royal Guru with a seat upon the *gadi* was preceded by a religious ceremony in the nature of an ordination or institution in which the *Mohunt*, or head of the parent *mutt*, placed the first defendant in the seat of headship, other heads of *mutts* taking part in this ceremony, and, certain religious rites following.

It is in evidence that the defendant, as the head of the *mutt* thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent, occasions given religious instruction. He is thus pointed out as the natural head and administrator of religious charity; and the office of head of the *mutt* and administrator of the charity have been associated from the first.

The headship of a *mutt* is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the *mutt*, to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jafar* v. *Aji* [1]; and further approved in *Trimbak* v. *Lakshman* [2]. This being so, there was no jurisdiction in the Indian Court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

1. (1864) 2 M. H. C. R 19. 2. (1895) I. L. R. 20 Bom. p 549.

Their Lordships think that the plaintiff should have his costs in the Court of First Instance, as he there recovered a very substantial part of his claim, *viz.*, his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands; but they think that there should be no costs of the appeals to the High Court and to His Majesty in Council.

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Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied, in so far as it confirmed that part of the decree of the lower Court, paragraph 8, which ordered that a scheme be settled for the due management of the religious and charitable properties, and so far as as it ordered the first defendant to pay the costs on appeal of the plaintiff and second defendant; and that the decree of the lower Court be varied by striking out paragraph 8, and that there be no costs of the appeal to the High Court or, to His Majesty in Council.

Solicitors for appellants:—*Chapman Walker and Shephard.*

Solicitor for respondents:—*Douglas Grant.*

A. P. P.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Sivanupandia Thevar and others ... *Appellants* * *(Plaintiffs).*

*v.*

Meenakshisundara Vinayaga Visakaperumal Sethurayar Avergal minor Zamindar of Urkad represented by M. R. Ry. Krishna Row Avl., Manager in charge of the estate under the Court of Wards. *Respondent (Defendant.).*

*Madras Estates Land Act, Ss. 3 (11), 40 (3) (a) and Sch. A, cl. (4)—Commutation of rent—"Preceding ten years," mode of computation of—"year," meaning of—Swamibogham, if 'rent'—Consolidated rent agreed to, by landlord and tenant—Objection by tenant that illegal cesses were included, if maintainable—Refusal to commute rent, by Revenue Court—Appeal—Forum—Interference by High Court in second appeal.*

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The term "preceding ten years" in S. 40 cl. 3 (a) of the Madras Estates Land Act means the ten years preceding the year in which the court actually determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The 'year' which is contemplated by the section is

* S. A. No. 1074 to 1084 of 1916. 7th March, 1917.

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neither the *fasli* nor the calendar year but the year for which the landlord is entitled either by custom or by contract, to claim rent.

*Swamibhogam* comes within the definition of 'rent' in S. 3 (11) of the Estates Land Act and is not a cess. Where a fixed grain *pattam* (rent) has been agreed to as between landlord and tenant, it is not open to the tenant to ask for a deduction on the ground that certain illegal cesses were included therein. The transaction under which the pattam was so fixed will be treated as an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year, by which the landlord gave up his claim whether enforceable or not, to recover certain cesses and by which both parties finally agreed that the rent shall be a consolidated quantity of grain thereafter.

Where a Revenue Court refuses commutation an appeal lies to the District Collector under Sch. A, cl. 4 of the Estates Land Act and not to the District Court and therefore no second appeal lies to the High Court from such refusal.

Second appeals against the decrees of the District Court of Tinnevelly on A. S. Nos. 186, 187, 188, 191, 195, 196, 205, 206, 210, 222, and 226 of 1915 preferred against the decrees of the court of the Honorary Deputy Collector of Tinnevelly in Summary Suits Nos. 121, 122, 123, 126, 131, 132, 141, 142, 146, 158 and 162 of 1914 respectively.

*T. R. Venkatarama Sastri* for *T. R. Ramachandra Aiyar* and *S. Ramaswami Aiyar* for the Appellants.

*V. Ramesam* for the Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

**Judgments**:—*Sadasiva Aiyar. J.*—These eleven second appeals have arisen out of suits brought by the tenants of the Urkad estate to have their rents, which had been mostly paid in grain and partially in cash, consolidated and commuted to a definite money rent under S. 40, Cl. 1 of the Madras Estates Land Act. One or more or all of the following six questions arise for decision in these second appeals.

Firstly, whether the lower courts were right in construing S. 40, Cl. 3 (a) of the Estates Land Act to mean that the Collector in making the determination as to the proper money rent should have regard to the average value of the rent actually accrued due to the landholder during the 10 years *preceding the year of the determination of such commuted rent* or whether the true meaning of that section is that the Collector should have regard to the average value of the rent during the 10 years *preceding the institution of the suit.* I am clear that according to the true construction of the language of the section, it means the ten years preceding the year when the Collector determined the amount

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of the commuted rent by his decision in the suit. I think that it is unreasonable to hold that an average rent of ten preceding years was intended (ordinarily) to come into force not immediately after the 10 years but with a break or interval occupied by the period during which the suit was pending. Mr. Venkatarama Sastriar mentioned some inconveniences which would be felt by the courts (Original and Appellate) in the trial of such suits if his interpretation of the section, (namely the ten years preceding the institution of the suit) was not accepted. I do not think that those inconveniences are of such a serious nature as to override what I consider to be the plain meaning of the clause. It has further to be remembered that this average of 10 years is only to form one of the considerations for the fixing of the commuted rent and that the court is at liberty to take other facts also into consideration where the circumstances are peculiar, (such as where some of the ten years are extraordinary years). I think that, in the decision of these cases relating to commutation of rent in second appeal, we ought not to interfere with the discretion of the Lower Courts except on very clear grounds as the whole question of commutation permits of and is intended by the legislature to be governed by the experience of Revenue Officers and by equitable considerations (some of a rough and ready character) permitting of the use of large discretion and practical sense.

Then the 2nd contention of the appellants is, that the year mentioned in the clause means the calendar year beginning with the 1st January and not the fasli year as taken by the Lower Courts. I am unable to find that this contention was raised in the Lower Courts, and I do not think that it is raised even in the grounds of the second appeal to this Court. However, I may shortly state that neither the calendar year nor the fasli year *as such*, is intended by this clause but the year for which the landlord according to custom or contract is entitled to claim rent, in other words, the year of the lease. The S. 3, Cl. 59 of the General Clauses Act (X of 1897) applies only as stated in the beginning of the section itself "where there is nothing repugnant in the subject or context." I think it is very clear from the subject and context of section 40 of th Madras Estates Land Act that the year mentioned therein means the yearly period for which rent is claimable as between the landlord and tenant and not the calendar year

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which would break up the year of the lease into two. In the present suits, the year of the lease happens to be the fasli year.

Then the third question argued related to the point whether the landlord is entitled to claim a small cash, Swamibogam rent of 7 fanams per kottah of lands. The word 'swamibogam' itself implies that it is the landlord's perquisites as owner of the land (in other words, profits which he is entitled to get from the tenant who occupies his land) and it clearly comes within the definition of rent found in S. 3 Cl. 11. I do not think it is open to us to indulge in mere speculation and to infer that because the landlord gets half the net grain-profits (after making certain deductions) as grain rent, the cash rent or swamibogam cannot also form part of the rent, but it is a "cess" having nothing to do with rent.

The fourth question that we have to consider is really the most important question in these cases, namely, whether when a fixed grain pattam had been agreed upon between the landlord and he tenant in respect of the lands (in one case 7 years before suit and in other cases 20 years before suit) the lower courts ought to have made a deduction from that pattam rent in order to ascertain what may be called the real grain rent which is commuted under S. 40. This deduction is claimed by the appellants on the ground that the pattam so agreed upon included some cesses and dues declared to be illegal in the case of waram lands.

I think that the very word "pattam" clearly means "rent" and even though the pattam might have been fixed after considering the claims of the landlord to certain dues which are not legally recoverable, we must treat the transaction under which the pattam was so fixed as due to an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year, by which the landlord gave up his claim, whether enforceable or not, to recover certain cesses and by which both parties finally agreed that the rent shall be such and such a consolidated quantity of grain thereafter. In such a case, I think it is not only very inconvenient but it is also not permissible to allow either party to go behind that arrangement and reopen it by contending that the rent ought to be higher or lower than the rent then fixed. I think I am fortified in this view by the case in *Jeeatoollah Parmanick* v. *Jagodindro Narain Roy* 1;

1. (1874) 22 W. R. 12

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where Mr. Justice Ainslie says at page 13, "The attempt which is now made to break up the total rent into its elements and take exception to some of them on the ground that they are illegal cannot be permitted." The present case is stronger than *Jeeatoollah Paramanik* v. *Jogendra Narain Roy* [1] as the details by which the total fixed rent was made up seem to have been specified in the contract in that case, whereas we have had no such details in writing before us. It is complained that the Deputy Collector did not allow such details to be brought up in the evidence of witnesses. So far as I could see, it seems to have been allowed by the Deputy Collector to be brought out in the evidence of P. W. 11 who prepared a statement showing those cesses so far as the waram lands are concerned. As regards D. W. 1 he said in answer to court, "In fixing the grain rent whether all items such as kaval, kankanam, pichai, kalvaivari which are set apart either for the landlord or the ryots or for common expenses when produce is divided were taken into consideration or not, *I do not know. I was not present when the grain rent was fixed.*" He could not therefore have given any evidence as to whether the grain pattam was fixed with reference to the inadmissible cesses also or not. I think therefore that no importance could be attached to the Deputy Collector's not having allowed questions to be put to the witness about these details.

The next (5th) contention in these appeals relates to the commutation prices fixed by the lower courts at Rs. 9 per kottah. That price was based on the taluq office reports. The objection to that price is based on the ground that the price of grain prevailing at the zamindar's village granary was the price which ought to be considered. The lower courts adopted the Taluq office prices as the plaintiffs did not prove that they were higher than the village prices, the Taluq office prices being based on the bazaar prices. Having regard to the evidence which shows that about 4 annas per kottah might be required to transport the grain to the bazaar from the village and also considering that it is always understood that the price at the village of the parties is invariably less than the price prevailing in the bazaar of the nearest town, I think that a deduction

1. (1874) 22 W. R 12.

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from the bazaar prices of at least 4 annas per kottah ought to be allowed. I would therefore allow such a deduction as regards the price.

Then the last point argued was whether the lower courts were justified in refusing to commute the rent as regards some of the lands involved in S. A. Nos. 1077 & 1083 of 1916 on the ground that the tenants of those lands had not got themselves recognised as pattadars by the landlords and hence those lands could not be said to be in their holdings having regard to the definition of holding in section 3 clause 3 of the Madras Estates Land Act. (Section 40 allows the ryot to sue for commutation only in respect of lands in his " holding "). Mr. Ramesam for the respondent took a preliminary objecton to our considering this point. That objection is that when the revenue court has refused commutation, an appeal lies to the Collector (see column 6 (a) of Schedule A to the Madras Estates Land Act against serial No. 4) and that therefore the appeals filed to the District Court on that point and the second appeals filed to this court against the District Judge's decision on that same point are both incompetent. I think I must accept the validity of this preliminary objection and therefore express no opinion on the soundness of this (sixth) contention.

In the result subject to the modification as regards the price of grain these second appeals must stand dismissed with costs.

*Spencer, J*:— I agree. On the first point I would add that I think that if the legislature had intended that the years to be taken as a basis for the calculation of rent should be the ten years preceding the institution of the suit, it would have said so in section 40 as it did in Ss. 31 and 37, and that in the absence of such words the Lower courts were not wrong in considering what was the rent in the years next preceding the determination of the rent. On the other points I have nothing to add, as I entirely agree with the views taken by my learned brother.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[ORIGINAL CIVIL JURISDICTION.]

PRESENT:—MR. JUSTICE COUTTS TROTTER.

The Clan Line Steamers Ltd. ... *Plaintiffs.**

*v.*

The Municipal Council of Cocanada. ... *Defendants.*

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*Madras District Municipalities Act (IV of 1884) S. 53—Profession tax, levy of—Carrying on business within the municipality, what constitutes—Question of fact.*

The plantiffs, the Clan Line Steamers Ltd., were an Incorporated Company having their registered office and head place of business in Glasgow. They owned a line of steamers which plied between English ports and the East calling among other places at Madras. and at Cocanada in the Godavari District. The agents for the 'Clan Line' in Madras were Messrs. Gordon Woodroffe and Co. Under an arrangement with Gordon Woodroffe and Co. Messrs. Ripley and Co., of Cocanada acted for the Clan Line Steamers Ltd., and received payment by commission The defendants were the Municipal Council of Cocanada, a District Municipality constituted under the Madras District Municipalities Act of 1884. Under S 53 of the Act the defendants levied a profession tax on the plaintiffs on the ground that the latter carried on business as a company and as shipowners within the Municipality. The plaintiffs paid the tax under protest and sued to recover the same. The facts found at the trial were these. Cocanada was mostly an exporting sea-port and hardly any cargo was discharged there. If by chance any cargo did go to Cocanada it was discharged from the Clan ships into lighters provided by the holders of the bills of lading Ripley and Co., did not handle the cargo though they might occasionally collect freight and transmit it to Gordon Woodroffe and Co. In the matter of booking space in the outgoing ships for cargo to be embarked at Cocanada, Messrs. Ripley and Co. had no controlling voice but could act only with the previous authorisation of Gordon Woodroffe and Co. Most of the arrangements for shipment from Cocanada were made by the Cocanada merchants with Gordon Woodroffe and Co., either directly or through shipping brokers at Madras. Sometimes the Cocanada shippers applied to Ripley and Co., to get them space on the Clan ships and their applications were forwarded to Gordon Woodroffe and Co., who generally sent what was called an engagement form through Ripley and Co., to the intending shippers. That form contained the acceptance and completed the contract. If time was short, Gordon Woodroffe and Co. telegraphed to Ripley and Co., instructions as to what amount of room was available for the proposed shipper. On receiving the authorisation, Riply and Co. issued a shipping order to the shipper who thereupon took the goods to the ship and obtained the mate's receipt and in due course, a bill of lading signed by Ripley and Co, for the master. If the goods put on board were in a slightly damaged condition the shippers obtained clean bills of lading on signing indemnity forms addressed to Ripley and Co, Ripley and Co. collected freight and disbursed the Clan ships, a large portion of the disbursements consisting in payments for stores supplied to the ship under contracts made by Gordon Woodroffe and Co. with the suppliers at Cocanada. *Held*, that the business of making shipping contracts for the Clan Line Steamers Ltd., with the Cocanada Merchants was substantially carried on at Madras, that the activities of the plaintiffs at Cocanada did not amount to a carrying on of business in the said place within the meaning of the authorities and that the levy of profession tax

* C S. No 219 of 1917. 2nd November 1917.

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by the defendants being illegal, the plaintiffs were entitled to a decree for the amount of the tax they had paid to the defendants

Cases on the subject reviewed.

Civil suit No. 219 of 1917 in the ordinary Original Civil Jurisdiction of the High Court.

*D. Chamier* and *Dr. Pandalai instructed by Messrs, King and Partridge* for the Plaintiffs.

*Messrs. Venkatasubba Row* and *Radhakrishnayya* for the Defendants.

The Court delivered the following

**Judgment** :—This is a case of considerable general importance and accordingly although the sum of money involved is not large it has been brought as a test case to this court. The plaintiffs the Clan Line Steamers Ltd., are a company incorporated under the English Companies' Act having their registered office and their head place of business in Glasgow. They own a line of steamers which ply between English ports and the East calling, among other places, at ports in Southern India, among them Madras, and Cocanada on the Coromandel coast in Godaveri District. The defendents are a District Municipality constituted under the Madras District Municipalities Act of 1884, and they have demanded a profession tax from the plaintiff company. The tax has been paid by the plaintiff company under protest and they now sue to recover it. The claim is for three instalments, but I need only concern myself with the third which was demanded on the 18th January last and paid on the 30th, the other two being time barred. The tax is leviable under S. 53 of the statute on every person who within the municipality exercises any one or more of the arts, professions, trades, or callings specified in Schedule A. Schedule A, Class I will cover the plaintiff Company either under (1) as carrying on business as a company or under (ii) as shipowners, if they can be said to carry on business within the municipality at all.

The question is ultimately one of fact, but the facts must be examined in the light of their legal significance, and this has been discussed in a number of cases in England. I need not concern myself with the few Indian cases that were cited, because they do not profess to add anything to the principles derivable from the English authorities. Before going to those authorities I will state the broad outlines of the facts of this case. I shall have to go into them in greater detail hereafter. The agents for the Clan Line

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in Madras are Messrs. Gordon Woodroffe and Company. It is not disputed that the Clan Line carry on business in Madras and they in fact pay profession tax to the Madras Corporation. It is said that they also carry on business in Cocanada through a firm of Messrs. Ripley and Co. Ripley and Co. are a firm of merchants at Cocanada, and for the past eleven years they have had an arrangement with Gordon Woodroffe and Co., as representing the Clan Line whereby they *disburse* the Clan Steamers at Cocanada, negotiate with the shippers for shipment of their cargo on Clan boats and receive payment by commission. The question is whether their activities at Cocanada, to use a non-committal phrase, constitute a carrying on of business there by the Clan Line within the meaning of the authorities.

These authorities fall into two classes which I may call for the sake of brevity, the tax cases and the jurisdiction cases. As pointed out by Cotton, L. J.. in *Erichsen* v. *Last* [1] there is a clear distinction between the two classes of cases, a distinction which I shall endeavour not to lose sight of, but I do not think that the jurisdiction cases must be wholly rejected. It seems to me that they contain enunciations of principle which can be applied at least *mutatis mutandis* to the other class of cases. The first case is *Erichsen* v. *Last* [1] itself. The question there was whether a foreign telegraph company established at Copenhagen was liable for income tax in the United Kingdom as exercising a trade within the United Kingdom. The Company had Cables with terminals at Newbiggin and Peterhead worked by employees of the Company at Newcastle and Aberdeen respectively. It had a London Office where messages were received for transmission *via* Denmark to various places abroad. It was held that they carried on a business in the United Kingdom and I think the gist of the decision is contained in the following passage from the judgment of Brett, L. J.: "I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." The next case is *Werle and Co.* v. *Colquhoun* [2]. Werle and Co. were a French firm of wine merchants, in fact the proprietors of Veuve

1. (1881) 8 Q. B. D. 414. 2. (1888) 20 Q. B. D. 753.

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Clicquot Champagne and the question was whether they carried on business in England through their agents Fenwick Parrot and Co, in Frenchurch street. The ground of the decision was clearly this: that contracts for the purchase of wine were made by Fenwick Parrot and Co. in England though they were transmitted to Werle and Co., to be executed from France. Lord Esher, M. R. says thus at page 760: "Upon the authority of that case, (viz, *Erichsen* v. *Last*) [1] if authority is required, but certainly on the facts of the present case, I have not a doubt that here there was a trade carried on in England where the contracts were made. The making of contracts in such a case as the present is the whole substance and essence of the trade, and so the appellants exercised a business in England". Fry, L. J., at page 761 says "They do not make merely an occasional contract through these agents, but they are in the habit of making contracts through them. Those contracts are so made in England. Now, pausing there, it appears to me that a most important part of the business of a champagne merchant was exercised by the appellants through the intervention of their agents within the United Kingdom." There was a distinct finding in that case that the agents did not merely make themselves the channel for the transmission of orders which could only be accepted by the principals in France but actually concluded contracts binding on the principal. This is clear from what Lord Esher says on page 758: "The agent is, if he can, to obtain orders for the purchase of the wine at the fixed price. It is suggested that he had no authority to receive these orders as contracts, but that all he could do was to forward them to Rheims for acceptance there. It seems to me that the inference is irresistible to the contrary." The next case is *Grant* v. *Anderson and Co* [2]. That was a jurisdiction case, the question in which was whether a writ against a Scottish firm could be served upon their London agent. In it appears clearly the distinction between the tax cases and the jurisdiction cases which I take to be broadly this: that a person is liable to be taxed if he carries on business within the jurisdiction but he can only be sued if he can be said to have a place of business within it. At the same time the Judges both in the Divisional Court and in the Court of Appeal clearly intimate that in their opinion the state of things in that case did not amount

1. (1881) 8 Q. B. D. 414 2. (1892) L. R. 1 Q. B. 108.

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even to carrying on business in London apart from the question of having a place of business there. There the defendants had an agent named McCallum with a London office. He obtained orders for them in London which he transmitted to Scotland to his principals to accept or not as they chose. Lord Esher says at page 116: "If he gets an order which they accept, he gets a commission, but if they do not accept it, he gets no commission. When he gets an order he has no power himself to accept it; all he has to do is to send it on to Scotland, that the defendants may say whether they will accept it or not, and in most cases, if they do accept it, they deal directly with the person giving the order". A little later he says: "His business is to obtain orders which are in law and in fact mere proposals." *Grainger & Sons* v. *Gough* [1] was another case of a French champagne merchant, in this instance Roederier and Sons. This was a tax case. The decision again went on the broad ground as to whether contracts were made for the sale of Roederier's wine in England. See Lord Herschall at page 334 and Lord Watson at page 340, and specially the observations of Lord Herschall at page 335: "In the first place, I think there is a broad distinction between trading *with* a country and carrying on trade *within* a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose any one would dream of saying that they exercise or carry on their trade in every country in which their goods find customers. When it is said, then, that in the present case England is the basis of the business, that the wine was to be consumed here, and that the business done would remain undone but for the existence of the customers in England, I cannot accept this as proof that Mr. Roederier carries on his trade in this country. It would equally prove that every merchant carries on business in every country to which his goods are exported..................How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again, with a view to profit. If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods." *La "Bourgogne"* [2] was a jurisdiction case, but in as much as it decided that the defendants

1. (1896) L. R. A. C 325. 2. (1899) L. R. A. C. 431.

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had a place of business in England, it is obviously a case that can be relied upon by the present defendants for the less wide proposition that the business was carried on within the jurisdiction, if the facts are truly analogous to the facts of the present case. A French steamship company were lessees of an office in London of which they paid the rent where they established a certain Fanet with the title of Agent-general. In that capacity he secured freight and passage engagements, collected freight and transmitted it to the Company, paid dues and forwarded and delivered goods carried by the Company. It was held that the business that was carried on by him was the business of the Company. *The Dunlop Case* [1] was a very peculiar case and was a jurisdiction case. A foreign firm took a stand at the Crystal Palace Cycle show and installed in charge of it an agent to exhibit there goods and take orders for them. It was held that during the show the company had a place of business in England. Again the chief test applied was whether or no contracts were concluded binding upon the company at the stand. In *Lowell and Christmas Ltd.* v. *The Commissioner of Taxes* [2] the appellants carried on a business of provision commission agents having produce consigned to them from New-Zealand which they sold on commission. They made advances through New Zealand Banks to the consignors of the produce against the security of the shipping documents. They kept a salaried servant in New Zealand who made an arrangement with the shippers as to the produce they would send and fixed the amount of the advance that was to be made. It was held that the business was not carried on in New Zealand but that the business was the selling on commission in the London market. This is a strong case, because the appellants actually kept a salaried servant devoting his whole time to their affairs in the country where the tax was sought to be levied. The reason for the decision I conceive to be that Messrs. Lowell and Christmas were not themselves purchasers of the goods but only agents to sell on commission. It is difficult to see how it could be argued that there was not a making of contracts by the Company in New Zealand. There were at least the contracts involved in the advances made against the shipping documents which must have entailed on the New Zealand shippers the obligation to repay any sum by which the price realised by the produce in London might fall short of the advance made against it. I take it tha

1. (1902) 1 K. B. 342. 2. (1908) L. R. A. C. 46.

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their Lordships must have held that the transactions regarding the advances were so subsidiary and ancillary to the main business of sale in London that it was right to regard the company as substantially carrying on their business in London and nowhere else. I regard the decision as a clear indication that it is the duty of a court to look at the question, broadly and in substance rather than fix on some small incident in the conduct of the business and say "here is a feature of your business which involves your entering into some contracts within this jurisdiction, therefore you carry on business here." *Saccharin Corporation Ltd.* v. *Chemische Fabrik Von Heyden Akteen Gesellschaft* [1] does not assist me not merely because it is a jurisdiction case but because, as is apparent from the judgment of the Lords Justices, it turned entirely on the weight to be attached to different parts of the evidence in the case. One important feature of it was that the agent apparently had in his possession and control stock of his principal's goods of which he could dispose without consulting them. *Actiesselskabet Dampskil "Hercules"* v. *Grand Trunk Pacific Railway* [2] only decided that if the directors of a company transact their financial business within the jurisdiction it does not avail them that their railway undertaking is situated and carried on outside it. *O'Kura & Co. Ltd.* v. *Forsbawa Jernverks Aktiebolag* [3] is a jurisdiction case, but there is one passage in the judgment of Buckley, L.J. which I think has an important bearing on the present case. In that case the defendants were a Swedish Corporation who employed in London as agents the firm of C. & J. Svedburg. C. & J. Svedburg were the London branch of C. & J. Svedburg at Stockholmin Sweden. At page 720 the learned Lord Justice says : " Whenever they (*i.e.*, C. and J. Svedburg) sell the defendants' steel they do so expressly as agents and after submitting the inquiry to their Stockholm house who in turn obtain from the defendants the price and terms upon which they are prepared to sell. When the agents in London have obtained the price and terms they submit them to the buyers, and if the buyers accept them, they then sign the contract as agents for the defendants. The agents have never sold any steel manufactured by the defendants except as agents and in the manner indicated. They have no control over the way in which the defendants do their business and have no general authority from them with regard to making contracts." It is clear that the learned Lord Justice was not considering the

1. (1911) 2 K. B. 516. 2. (1911) (1912) 1 K. B. 222.
3. (1914) 1 K. B. 715.

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question as to whether they had a place of business merely but as to whether they were carrying on a business, for he says at page 718: "If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business." Therefore the sole question for determination was whether that which took place amounted to a carrying on of a business in London and the decision of the Court of Appeal was that it did not. In *The Thames and Mersey Marine Insurance Co.* v. *Societa-&c. Lloyd Austriaco* [1], the decision was adverse to the foreign firm on very strong facts. The following observations of Buckley, L. J., seem to me to have some bearing on the present question: "The test in each case is to find the answer to the following question, does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent in carrying on the agent's own business sell a contract with a foreign corporation?"

These being the principles by which I am to be guided, the facts of the present case must be examined. I had before me two witnesses, Mr. Stroutts, the manager of the shipping department of Gordon Woodroffe and Co., and Mr. Hunter, a partner in the firm of Ripley and Co., who is in charge of their Cocanada business. They have placed the whole of the relevant facts and documents before the Court, and their evidence, as one would expect, is not challenged in any respect. I do not think any question arises with regard to cargo discharged at Cocanada. As a matter of fact hardly any cargo is discharged at Cocanada as it is almost exclusively an exporting town. If by chance any cargo does go there it is discharged from the ship into lighters provided by the holders of the bills of lading and it is not handled by Messrs. Ripley and Co. They may occasionally collect freight and transmit it to Gordon Woodroffe and Co., but I do not think it is in evidence that they actually have done so, and Mr. Venkatasubba Row did not invite me to draw any conclusion in his favour from anything that took place in regard to cargo discharged at Cocanada. The whole discussion ranged round the course of business with regard to cargo shipped at Cocanada. Ripley and Co. made the arrangement to act for the Clan Line steamers with Gordon Woodroffe and Co., some ten years ago, and the letters evidencing that arrangement have been put in. They are themselves fairly large

1. (1914) 111 L. T. 97.

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shippers. They get commission on their own shipments and a smaller commission on other people's shipments. In the important matter of booking space in outgoing ships for cargo to be embarked at Cocanada it is abundantly clear that they have no controlling voice whatever. Most of the arrangements for shipments are made by the Cocanada merchants with Gordon Woodroffe and Co., in Madras either directly or through shipping brokers in Madras. Sometimes the Cocanada shippers apply to Ripley and Co., to get them space on a Clan Line Steamer. Ripley and Co. have no authority to give space even for a box of cigars without the previous authorization of Gordon Woodroffe and Co. If application is made to them for cargo room they forward it to Gordon Woodroffe and Co., at Madras, and Gordon Woodroffe and Co. generally send what is called an engagement form to the intending shipper. If time is short, Gordon Woodroffe and Co. telegraph to Ripley and Co., instructions as to what amount of room is available for the proposed shipper. The course of business is clearly seen from a specimen letter dated the 30th August 1916 relating to SS. Maclachlan. On receiving authorization from Gordon Woodroffe and Co., Ripley and Co. issue a shipping order to the shipper. Armed with this he takes his goods to the ship, obtains the mate's receipt and in due course the bill of lading. The bill of lading is signed by Ripley and Co., for the Master. Occasionally it happens that goods are put on board in a slightly damaged condition. The shippers are of course anxious to obtain clean bills of lading and can only do so on signing indemnity forms. These are addressed to Ripley and Co., and a specimen was put in of a firm of Vavasseur and Co., Ltd., dated the 2nd May 1917. They also collect freight and disburse the ship. Most of the course of business is clear from the specimen account dated the 15th September 1917 relating to that voyage of the Clan Stuart. With regard to the disbursements a large portion of them consists in payments for stores supplied to the ship.

The evidence regarding these stores is that contracts are made by Gordon Woodroffe and Co., with the suppliers at Cocanada for certain rates for each article in the Schedule. Ripley and Co. have nothing to do with the formation of those contracts. When the ship arrives off Cocanada the Captain specifies what quantity he wants of each article. The goods are put on board by the contractor and Ripley and Co. pay the bill according to the scheduled rates in the contract.

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Three points have been taken for the defendants. The first is with regard to the booking of cargo space. It is said that in those cases where the shipper applies at Cocanada to Ripley and Co., for cargo space and ultimately gets from them a shipping order that constitutes a making of a contract by the Clan Line at Cocanada. It is said that the fact that Ripley and Co. cannot make the contract without the express authority of Gordon Woodroffe and Co., is not to the point, and that the fact remains that they do make the contract. That contention seems to be disposed of by the observations of Buckley, L.J. in *O'Kura and Co., Ltd.* v. *Forsbacka Jernverks Aktiebolag* [1] which I have already cited. Even apart from that, I think the course of business here shows clearly that in the vast majority of cases the real contract is made direct with Gordon Woodroffe and Co., at Madras by means of an engagement form and that the shipping order is a mere piece of office machinery to carry out the contract contained in the engagement form. In the occasional case where the shipper applies so late as to necessitate telegraphic communication to Madras I think that Ripley and Co. are and are recognised to be mere conduit pipes to obtain the assent of Gordon Woodroffe and Co., to the proposal of the shipper; and I do not think that Ripley and Co. can in any real sense be said to make a contract with the shipper.

The next point relied upon was that Ripley and Co. signed the bill of lading and it is said that as they signed the contract of affreightment, that is conclusive of the matter. The bill of lading is no doubt evidence of the contract of affreightment and in most cases it is practically conclusive evidence of it; but it is never perhaps, and certainly very frequently not, the contract of affreightment itself. See per Lord Bramwell in *Sewell* v. *Burdick* [2] and Scrutten on Charterparties and Bills of Lading, Article 3. It is not the contract of affreightment where there is a charterparty: nor I think where there is any antecedent document undertaking the carriage of the goods. In this case it is clear that the real contract of affreightment is contained in the engagement form or in the telegram of authorization in the exceptional cases where there is no time to send an engagement form. I am therefore of opinion that there is nothing in the fact that Ripley and Co. sign the bills of lading to warrant

1. (1914) 1. K. B. 714. 2. (1884) 10 A. C. 74 at p. 105.

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the deduction that the Clan Line carry on business at Cocanada. The modern practice of having bills of lading signed by the local agents rather than by the Captain is one of commercial convenience, it having become evident that the commercial side of the ship's business can be better transacted in an office with a proper clerical staff than by the Master. But suppose that this case had arisen in the old days when the bills of lading were signed by the Master who is unquestionably the agent of the ship-owners if the contention on this point for the Municipal Council were sound, it would follow that the Shipping Company transacted business within the meaning of the taxing statutes at every port of call at which the Master of the ship gives bills of lading. Such a conclusion to my mind is commercially too absurd to be accepted.

The last contention on behalf of the municipal council is a highly technical one and is based on that unfortunate section 5 of the Indian Contract Act. The argument is this: Suppose an intending shipper to forward through Ripley and Co. a request for cargo space to Gordon Woodroffe and Co, at Madras; Gordon Woodroffe and Co. send an engagement form to Ripley and Co., at Cocanada, to hand on to the shipper. That form contains the acceptance and completes the contract. And it is argued that as the contract only becomes complete when the acceptance reaches the shipper, the contract is finally made at Cocanada, because Gordon Woodroffe and Co. could recall that at any moment before it reached the shipper: Ripley and Co. acted entirely under their orders, and therefore the posting of the engagement form at Madras to Ripley and Co., was not an irrevocable acceptance of the offer. The first thing I have to say about this is that there is no evidence that that has ever actually been done. Mr. Stroutts says that the regular thing is to post the engagement form to the shipper direct and he knows of no instance where in fact it was sent through Ripley and Co. Mr. Hunter says that he can recall no actual instance, either, but he says quite frankly that he is not prepared to say that it never happened and that if Gordon Woodroffe and Co. did send an engagement form filled in with the name of a particular shipper at Cocanada he would as a matter of course hand it over to the shipper. Apart from that question of fact I think the argument though superficially ingenious is really unsound. If such a transaction took place I think the only possible inference is that a shipper who knows that Ripley

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and Co. have no authority to accept or reject until they hear from Gordon Woodroffe and Co., must be taken to hand Ripley and Co., his request to be forwarded to Madras for acceptance or rejection there and not for acceptance or rejection at Cocanada. I think he may be regarded as selecting Ripley and Co., as a mere channel for ascertaining whether or no Gordon Woodroffe and Co. have accepted his offer in Madras. In any case I think that even if this case did occasionally happen once in a way and did amount in odd instances to a contract being technically in-law concluded in Cocanada, I ought to take the broader view in obedience to the authorities and look to see where in substance the business of making contracts of the Clan Line was carried on and controlled. That was clearly in Madras and I must hold that the Clan Line does not carry on the business of ship owners in Cocanada. That conclusion is not affected by the fact that Ripley and Co. put the name of the Clan Line on their office paper and describe themselves as its agents. More than one case shows that this is an immaterial factor.

There must be judgment for the plaintiff for Rs. 50 and taxed costs. I will certify for two Counsel and costs of filing suit at Cocanada.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING AND MR. JUSTICE KUMARASWAMI SASTRI.

Annavajhula Venkatachellamayya Garu... *Appellant** (*Petitioner decree-holder.*)

v.

Ramagirjee Neelakanta Girjee ... *Respondent (1st Counter-Petitioner.)*

Venkatachellamayya Garu v. Neelakanta Girjee.

*Civil Procedure Code, O. 21, Rr.—71, 84, 86—Sale in execution of the right to have a reconveyance within a specified day—Deposit of 25 per cent—Balance not paid within 15 days of sale—Re-sale after the expiry of the period for reconveyance—Period of reconveyance elapsed pending the period of 15 days—Right to claim the deficiency in the re-sale—Scope and Construction of O. 21, Rr 71, and 85.*

Where a judgment debtor had conveyed properties to another with a covenant that if he paid the sale amount before the 31st August 1914, the properties should be reconveyed to him and the right of the judgment-debtor under such agreement was put up for auction in execution of the decree and sold on the 25th August 1914, and the auction purchaser paid the deposit of 25 per cent under O. 21, R. 84 but failed to pay the balance within the 15 days and consequently the right of the judgment-debtor was put up for re-sale after the 31st August 1914 (the last

* L. P. A. No. 42 of 1917. 15th October 1917.

Venkata-chellamayya Garu v. Neelakanta Girjee.

date for reconveyance) and fetched a very low price, the first auction purchaser is bound to pay the deficiency in the sale price at the re-sale under O. 21, R. 71, of the Civil Procedure Code.

*Per The Chief Justice.* (Ayling J. concurring). The Judgment-debtor's right to a reconveyance on the payment of a fixed sum before a stipulated day can be the subject of an effective sale in execution, even if the sale takes place less than 15 days before the stipulated date, though under O. 21, R. 85, the purchaser has 15 days to pay the balance, and the sale is not final until confirmed after not less than 30 days of the sale. These provisions were made *alio intuitu* and were not intended to have the effect of rendering the properties not liable to be sold under the above circumstances. The Court auction purchaser could if necessary have procured the concurrence of the judgment-debtor in making the tender of the amount for reconveyance, without prejudice to the question of the confirmation of the sale and in that case would have been entitled to a charge on the property so released.

*Per Kumaraswami Sastri, J.* The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and the property re-sold should substantially be the same and that any difference will not matter, if the difference in the condition of the propetry or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Oldfield, dated 7th February 1917 in A. A. O. No. 91 of 1916 preferred against the order of the District Court of Nellore, dated 31st January 1916 in C. M. P. No. 108 of 1915 in E. P. No. 55 of 1914 (C. S. No. 187 of 1912 on the file of the High Court in the Exercise of its Ordinary Original Civil Jurisdiction).

[The facts are fully stated in the Judgment of Mr. Justice Kumaraswami Sastri.]

*K. Srinivasa Aiyangar* and *S. Varadachariar* for the Appellant.

*The Hon. The Advocate General (S. Srinivasa Aiyangar)* for the Respondents.

The Court delivered the following

The Chief Justice.

**Judgments**:—*The Chief Justice*:—Under Order 21, rules 84—86 of the Code of Civil Procedure on the default of a purchaser at a court-auction either in making the deposit or paying the balance of purchase money within the specified period the property is to be resold; and under Order 21, rule 71 any deficiency in price which may occur at the re-sale together with the expenses attending the re-sale, as certified to the Court, are recoverable at the instance of the decree-holder or the judgment-debtor under the

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provisions relating to the execution of a decree for the payment of money. By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, *viz.*, the decree-holder and the judgment-debtor. These damages estimated by the ordinary rule consist of the deficiency if any in the price obtained at the re-sale as compared with the price at the first sale together with the expenses of the re-sale ; and the rule provides a summary method of recovering these damages in execution by the Court at the instance of either of the parties interested, the decree-holder or the judgment-debtor. This is a statutory provision intended to minimise the hardship resulting from the purchaser's default, and I see no reason why the Court should refuse to give effect to it unless the defaulting purchaser would be substantially prejudiced. This was the case in *Baijnath Sahai* v. *Moheep Narain Singh* [1] where he had been induced to bid for the property as unincumbered by the fact that the incumbrances were not mentioned in the proclamation of sale and the re-sale was on a proclamation in which the incumbrances were mentioned. In such a case the difference between the two prices could not be regarded as a fair measure of damages, as the purchaser who afterwards defaulted must obviously have made a higher bid than he would have done if he had known of the incumbrances. If the learned Judges in *Baijnath Sahai* v. *Moheep Narain Singh* [1] and *Kali Kishore Deb Sirkar* v. *Guru Prosad Sukil* [2], intended to lay down a more stringent rule I am with great respect unable to agree with them.

There was no circumstance of this kind in the present case. The efforts, in which the Legislature joined, to save the ancient Zamindari of Kalahasti from being sold in execution having finally failed, a taluk, of the North Arcot District, was attached and brought to sale at the instance of a judgment-creditor. The taluk had been conveyed to a Mahant for six lakhs of rupees with an agreement for reconveyance if the money was repaid before a stipulated date, the 31st August 1914. The sale in execution to the respondent took place on the 25th August 1914 only a few days before the stipulated time for repayment to the Mahant, and the respondent was no doubt aware of this when he bid, as he would not have bid more than five lakhs for the judgment-debtor's

1. (1889) I. L. R. 16 Cal. 535. 2. (1897) I. L. R. 25 Cal. 99.

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interest without satisfying himself of the terms of the agreement for reconveyance mentioned in the sale proclamation, and in any case he must be taken to have had notice of it. The case for the appellant is that he was a man of straw employed by the Mahant to get the property knocked down to him as the highest bidder and make the necessary deposit with the money supplied by the Mahant in order to keep out genuine purchasers and to ensure that the specified date should be allowed to go by without repayment and the right to a reconveyance be lost; but all this has not been gone into and it is unnecessary to rely on it. On the 25th of August, the date of the sale, the respondent made the necessary deposit of Rs. 1,72,500 which entitled him to a delay of 15 days to complete the purchase, *vide* Order 21, rule 85. On the completion of the 15 days he defaulted, and it became necessary to re-sell. By that time the 31st August 1914 had gone by, and the purchaser would no longer have a clear right to a reconveyance from the Mahant on payment of six lakhs, and could only rely on the positions that the transaction was really a mortgage or that the tender had been made before the specified date and refused. Now it is quite clear that what was put up to sale and purchased by the respondent on the 25th August included the right to get back this taluk from the Mahant on payment of six lakhs before the 31st August, and if he chose to purchase the judgment-debtors' interest and let the day go by, I am clearly of opinion that he is the person to bear the resulting loss. The other view as regards this part of the case appears to be that the judgment-debtor's right to a reconveyance on payment of a fixed sum before a stipulated day, which might be a most valuable right and in this case is said to have been worth much more than the five lakhs which the respondent agreed to pay for it, cannot be made the subject of an effective sale in execution, if the sale takes place less than fifteen days before the stipulated date, as under Order 21, rule 85, the purchaser has fifteen days to pay the balance and the sale is not final until confirmed after not less than thirty days. These provisions in my opinion were made *alio intuitu* and were not intended to have that effect. He could, if necessary, have procured the concurrence of the judgment-debtor in making the tender to the Mahant without prejudice to the question of the confirmation of the sale, and in that case would have been entitled to a charge on the property so released. In any view he got what

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he bargained for, and I can see no reason why he should not incur the ordinary consequences of failing to complete his bargain.

It is quite clear, and has not been disputed before us, that at the re-sale consequent on the respondent's default, the judgment-debtor's right, title and interest in the same properties was brought to sale. It was, however, no longer possible to put up a right to reconveyance on payment before the 31st August 1914 as that date had gone by; but the nature of the judgment-debtor's interest was represented as favourably as possible in the proclamation as it alleged that the transaction with the Mahant was a mortgage and also that the agreement for the reconveyance still subsisted because, it alleged, the Mahant had fraudulently gone away from his residence to avoid receiving the tender of six lakhs which the judgment-debtor made before the stipulated date. In this case the sale and the re-sale were both duly held and were of the judgment-debtor's interest as it existed at the date of the sale and re-sale respectively, and the depreciation which occurred in the meantime was one for which the respondent was exclusively responsible. In these circumstances I see no reason why the deficiency should not be recovered from him under the Code. It was scarcely disputed before us that he would have no answer to a suit for damages, and I see no reason for refusing to give effect to the plain language of the Code. I concur in the order proposed by Kumaraswami Sastri, J.

Ayling, J.

*Ayling, J.* :—I concur.

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—This Appeal arises out of an application by the decree-holder to recover from the auction purchaser the loss arising from a resale held in consequence of his default. Certain villages forming part of the Kalahasti Zamindari were brought to sale in execution of a decree against the Zamindar. The villages had been conveyed by the Zamindar to one Raja Bahadur Narsingar Gyangirji of Hyderabad for six lakhs of Rupees by a deed dated 4th August 1908. The Zamindar got an agreement to reconvey bearing the same date if the sum of six lakhs was repaid by the 31st August 1914. The sale proclamation specified the two documents as also other documents not material for the purpose of this Appeal. The Zamindar's interest in the property conveyed was described as "the right of obtaining a reconveyance under the reconveyance agreement dated 4th August 1908 executed and given to the defendant by Raja Narasingar Gyangirji Garu residing at Hyderabad and all the other rights and interest possessed

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by the defendant in these villages." The sale took place on the 25th August 1914 and the respondent who was the highest bidder was declared the purchaser for six lakhs and ninety thousand rupees. He paid Rupees 1,72,500 the deposit required by Order 21, rule 84 of the Code of Civil Procedure. Rule 85 gave him 15 days for the payment of the balance but he failed to pay the sum and complete the purchase.

There was so far as I can see no excuse for his not paying the balance. It is not shown that there was any irregularity in the proceedings that led up to the sale or that any circumstances existed on the date of sale which would justify the purchaser in refusing to complete the purchase. He knew perfectly well what he was purchasing and the risks he ran. There is no warranty of title in sales by Court in execution of decrees and as Order 21, rule 91 only applies to cases where there is no saleable interest. So long as the judgment-debtor has any interest however small in the property the purchaser cannot except in cases where he would have right to set aside the sale on the ground of material irregularity under Order 21, rule 90 avoid his purchase.

Order 21, rule 86 provides for a re-sale in case the purchaser makes default in paying the balance of the purchase money within the time limited by rule 85. The defaulting purchaser is under rule 71 liable to pay the deficiency in price if any and the same on being certified by the officer holding the sale is recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Owing to the respondent's default the property was put up for re-sale. Both Mr. Justice Oldfield and Mr. Justice Bakewell agree in holding that the same villages were put up for sale the second time and this is not disputed before us. When the property was purchased by the respondent at the first sale there were only six days within which six lakhs had to be paid in pursuance of the agreement to reconvey dated 4th August 1908. This period elapsed within the 15 days allowed to the respondent to pay the balance of purchase money and it is clear that no re-sale was possible within the period when the six lakhs was payable. At the date of the fresh proclamation rendered necessary by rule 87 before re-sale the position of the Zamindar, the judgment-debtor in relation to the villages advertised for sale became altered. Whereas prior to the 31st August 1914 he was entitled to a

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reconveyance on tender or payment of six lakhs, he could after that date in the absence of proof of tender in time only get a reconveyance if he was able to show that the transaction evidenced by the sale deed and agreement to reconvey of the same date was in law a mortgage and not a mere sale with an agreement to repurchase. It was alleged by the Zamindar that he did make a tender within the 31st August which was improperly refused, but as this allegation has not been enquired into by the District Judge, I shall proceed on the footing that no such tender was made.

The proclamation for re-sale had to mention the state of facts as they stood on the date when it was settled by the Court. There is nothing in the Code requiring that the proclamations of sale and re-sale should in all respects be identical and having regard to the duty of the Court to give intending purchasers correct information, it is difficult to see how mention of a material alteration in the circumstances between the first and second proclamations could be avoided. The second proclamation therefore contained a statement to the effect that tender of six lakhs was made and was improperly refused, that the transaction evidenced by the deed of sale and agreement to repurchase dated 4th August 1908 was a mortgage, that Gyangirji has only the right to recover six lakhs of rupees and that the property was sold subject to the right.

It is difficult to see how these statements could be prejudicial to the first purchaser. Their tendency was if anything to induce persons to purchase for a higher price, as a bald statement after the 31st August 1914 that the property was agreed to be reconveyed if six lakhs were paid before the 31st August 1914 would be useless. The only person to complain would be the second purchaser if the allegation as to the tender and the effect of the sale and agreement to reconvey were not correct but he has raised no objection and the sale to him has been confirmed.

The chief contention raised by the learned Advocate General for the respondent is that in order to attract the provisions of Order 21, rule 71 what is sold at the re-sale should be in all respects the identical property that was sold the first time, identical not only with reference to the description and area of the property sold but also with respect to the interest of the judgment-debtor therein, and that consequently the sale at which his client purchased being the right of the judgment-debtor to get a reconveyance on tender of six lakhs without reference to the nature of the transaction evidenced by the sale-deed and agreement to reconvey (which was a clear and

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good title), the re-sale of the properties in which the judgment-debtor's interest was only the right to obtain a reconveyance on proof that the transaction was only a mortgage—a fact which the subsequent purchaser had to prove at his risk, was not a re-sale contemplated by rule 71. Reference has been made to *Baijnath Sahai* v. *Moheep Narain Singh* [1], *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* [2], and *Gangadas Dayabhai* v. *Bai Suraj* [3].

In *Baijnath Sahai* v. *Moheep Narain Singh* [1], the first proclamation of sale contained no statement as to the encumbrances on the property put up for sale while the proclamation for re-sale set out the encumbrances. It was therefore clear that the purchaser at re-sale would have paid considerably less than the first purchaser who purchased the property on the assumption that it was unencumbered, and the deficiency of price was attributable not to the first purchaser's default but to the misdescription in the first proclamation. In *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* [2], the defaulting purchaser had applied to set aside the sale under S. 313 of the Civil Procedure Code and the finding was that there was a material misdescription in the sale proclamation. In the first case the learned Judges observe that a change in the nature of the property by diluvian and the like causes beyond the control of anybody might not relieve the defaulting purchaser from liability. Their observations as to the effect that S. 293 of the Act of 1882 applied only to cases when the same property was sold under the same description at both sales must be read in the light of the later observations as to the change in the property by causes beyond the control of the parties.

I do not think that it was intended to lay down as an inflexible rule that if a few trees on the land fell down or a portion was washed away between the dates of sale and re-sale there could be no re-sale so as to make the defaulting purchaser liable for the deficiency. The observations in *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* [2] as to the effect of correctly stating in the proclamation of re-sale what was incorrectly set out in the first proclamation are *obiter* and with all respect I fail to see why the correction of errors at least of such as would in the ordinary course enhance the value of the property at the second sale should be a valid ground of objection.

1. (1889) I. L. R. 16 Cal 535.
2. (1897) I. L. R. 25 Cal. 99.
3. (1911) I. L. R. 36 Bom. 329.

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The general rule no doubt is that it is the property which was sold on the first occasion that must be put up for sale but this is subject to the property remaining identical. If owing to natural causes or causes attributable to the defaulter, there should be any change either in the property or the wording of the sale proclamation, there is nothing in the Code to release the defaulting purchaser from his liability under Order 71.

*Gangadas Dayabhai* v. *Bai Suraj* [1] was a case where it was admitted that the first proclamation did not state either fairly or accurately the property to be sold. The property was described as that of A in the first sale and as that of B in the second.

*Sooruj Buksh Singh* v. *Sree Kishen Doss* [2] cited by the vakil for the appellant is more in point. In that case a purchaser at a Court sale declined to complete the purchase on the ground that the property had been sold the next day in execution of another decree by a party who had a previous mortgage on the estate. The property was subsequently re-sold and he was asked to pay the difference. The Sudder Ameen held that the first purchaser was not liable under S. 254 of Act VIII of 1859 which is substantially the same as Order 21, rule 71 of the Act of 1908 but his decision was reversed by the High Court on the ground that he had purchased something though perhaps less than what he had expected and that if he chose to bid he was bound to complete his purchase. From the facts as set out in the judgment it appears that the decree obtained by the mortgagor was in force at the date of sale which, unless discharged before the sale fixed for the day after the first sale, would entail the consequences that the property would pass under a title paramount to that of the first purchaser and that the re-sale was after the sale in execution of the mortgage decree when no title remained in the judgment-debtor.

Time runs and with it follows change. The provisions of Order 21 of the Code of Civil Procedure as to re-sale in case the balance of purchase money is not paid necessitate a delay of at least one and a half months from the date of the first sale. The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and property re-sold should be substantially the same and that any difference

1. (1911) I. L. R. 36 Bom. 329.
2. (1811) 6 W. R, p. 126 (Miscellaneous rulings.

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will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

It has been argued that the provisions of rule 71 are summary in their nature and so should receive a very strict interpretation. Rule 71 only enacts the rule that the measure of damages in cases when a purchaser commits default is the difference between the price at which he agreed to purchase and the price realized at a re-sale. I do not think the rule prevents the defaulting purchaser from raising such objections as are competent to him under Order 21 of the Civil Procedure Code to raise. It is a principle of natural justice that a person should be given an opportunity of showing cause before an order adverse to him is passed and though Rule 71 does not expressly provide for the issue of a notice to the defaulting purchaser it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. In all the cases decided under the old and the new Code the defaulting purchaser did appear and raise objections which were adjudicated upon by the Court and he was held by the Calcutta and Madras High Courts to have a right of appeal. I need only refer to *Sworuj Buksh Singh* v. *Sree Kishen Doss*, [1] *Baijnath Sahai* v. *Moheep Narain Singh*, [2] *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* [3], *Amir Buksha Sahib* v. *Venkatachala Mudali* [4].

I do not, therefore, see any good reason for placing an unduly restricted interpretation on Order 21, rule 71. Having regard to the fact that there is no warranty of title in the case of sales by Court (the maxim *Caveat Emptor* applying) and that the purchaser cannot avoid the sale so long as the judgment-debtor has some interest however small in the property the objections which the defaulting purchaser can urge are practically confined to those which can be urged in an application to set aside a sale under Order 21 and proceedings under rule 71 are neither more nor less summary than proceedings under Order 21 to set aside a sale.

It was also argued that it was the duty of the judgment-debtor or the decree-holder to keep the title alive between the period of sale and confirmation and that as no tender was

1. (1866) 6 W. R. Mis. 126.
2. (1889) I. L. R. 16 Cal. 681.
3. (1897) I. L. R. 25 Cal. 99.
4. (1895) I.L.R. 18 Mad. 439=5 M.L.J. 206.

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made of 6 lakhs the defaulting purchaser is not liable. As the sale was only of the right, title, and interest of the judgment-debtor subject to the conditions in the agreement to reconvey on repayment of 6 lakhs, it is clear that the person to pay the 6 lakhs was the purchaser, the price he pays being estimated with reference to the existing liability on the property. There was under the terms of the proclamation no duty on the decree-holder or judgment-debtor to pay 6 lakhs.

With reference to the argument that the defaulting purchaser had no legal right to tender 6 lakhs as he acquired no title on the 31st of August, the last date for the tender, I think the auction purchaser has an interest on the property which would make any tender by him valid. The position of a person between the date of sale and the date of confirmation is not that of a person who has only an agreement to sell in his favour. S. 65 of the present Code unlike S. 316 of the old Code vests title in him from the date when the property is sold and not from the time the sale becomes absolute. It is no doubt true that the sale is liable to be set aside either by payment under Order 21, rule 89 or, for irregularity or want of title under Order 21, rules 90 and 91, but it does not follow that a person who under Order 21, rule 84 has been "declared to be the purchaser" by the officer conducting the sale has no interest in the property sufficient to prevent a forfeiture or preserve the title from destruction. The observations of their Lordships of the Privy Council in *Bhavani Kunwar* v. *Mathura Prasad Singh* [1], as to the rights and duties of an auction purchaser as from the date of sale are in point.

I am of opinion that no valid grounds exist in the present case for not making the defaulting purchaser liable for the loss arising from the re-sale. I would allow the Letters Patent Appeal and set aside the order of the District Judge with costs in this and the lower Court. The District Judge will dispose of the application of the appellant with regard to the deposit paid by the respondent according to law.

C. A. S.

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1. (1912) I. L. R. 40 Cal. 89 at 103.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SADASIVA AIYAR.

Nynam Veetil Mayan Kutti ... *Appellant* (Plaintiff).*

*v.*

Valappilakath Kunhammad and others ... *Respondents . (Defendants Nos. 1 to 6 and 9 to 17).*

Nynam Veetil Mayan Kutti *v.* Valappilakath Kunhammad.

*Malabar Law—Decree for ejectment of tenant on payment of compensation—Execution of decree, barred—Fresh suit for ejectment, if maintainable—Cause of action—Merger of, in decree.*

A landlord who obtains a decree for ejectment against a Malabar tenant on payment of compensation but allows execution of the decree to become barred by limitation, cannot institute a fresh suit for ejectment.

*Kutti Ali* v. *Chindan* [1], dissented from. *Vedapurathi* v. *Vallabha Valia Raja* [2] referred to.

Per *Chief Justice* :—Ordinarily when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum* ; and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 143 of 1916 preferred against the decree of the Court of the District Munsif of Ponnani in O. S. No. 400 of 1914.

*C. Madhavan Nair* for the Appellant.

*M. N. Krishna Aiyar* for the Respondents.

The Court delivered the following

Wallis, C. J.

**Judgment** :—*The Chief Justice* :—This case raises a question of considerable importance and interest, namely, what is the effect of a plaintiff, who obtains a decree in ejectment in Malabar directing payment of compensation, allowing that decree to become barred. The question is whether he is entitled to maintain another suit, as it is contended, upon his title, a proposition which is supported by reference to the decision of *Kutti Ali* v. *Chindan* [1]. Now the ordinary principle is that, when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum;* and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred, his rights are gone. When a lessor sues to eject a lessee he has to prove that there was in existence a lease and a determination of that lease. That is his cause of action, and if he

* S. A. No. 152 of 1917. 21st December, 1917.

1. (1900) I. L. R. 23 M. 629. 2. (1902) I. L. R. 25 M. 300.

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gets a decree and allows that decree to become barred, it seems to me that, on general principles, his remedy is gone. I do not with great respect, quite understand what is meant in *Kutti Ali* v. *Chindan* [1] by saying that he will still be allowed to sue on title. The suit on title, I take it, is a suit to eject the defendant on the ground that he was a trespasser. Even if it could be said that the effect of a decree in ejectment was to determine the tenancy and convert the tenant into a trespasser, that would not apply to the present case where the tenant has a statutory right to continue in possession after decree until he is paid for his improvements. Further, the decision in *Kutti Ali* v. *Chindan* [1] seems difficult to reconcile with the subsequent decision of a Full Bench of five Judges in *Vedapuratti* v. *Vallabha Valiya Raja* [2], in which it was held, overruling some earlier cases that, where a mortgagor brings a suit for redemption and allows the decree for redemption to become barred, his rights are gone and he cannot bring a subsequent suit for redemption. I do not see any reason why the same doctrine is not applicable to the case of lessor and lessee. Lastly, as regards the Malabar tenancies, I think that the provisions of Ss. 5 and 6 of the Malabar Compensation for Tenants' Improvements Act, strongly support the view I have taken and show that it was the intention of the legislature that these matters should be dealt with in execution. S. 5 provides that, notwithstanding the determination of the tenancy, the tenant is entitled to remain in possession until ejectment in execution of a decree or order of Court. S. 6 deals with the form of the decree in ejectment and the determination of compensation, and the decree is to direct that "on payment by the plaintiff into Court of the amount so found due and also the mortgage money (if any), the defendant shall put the plaintiff into possession of the land with the improvements thereon," which is very like a decree for redemption. Sub-section (3) deals with compensation for subsequent improvements and re-valuation, if necessary, of the improvements at the time of ejectment. Sub-section (4) provides that "every matter arising under S. (3) shall be deemed to be a question relating to the execution of a decree within the meaning of cl. (c) of S. 244 of the Code of Civil Procedure." It seems to me *a fortiori* that the payment of the compensation which is assessed in the suit by the decree is still more a matter, or at least as much a matter, relating to execution and is intended to be dealt with as such. As I understand the scheme of the Act,

1. (1900) I. L. R. 23 M. 629. 2. (1902) I. L. R. 25 M. 300.

Nynam Veetil Mayan Kutti v. Valappilakath Kunhammad.

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it is that it leaves the decree passed under the Act for ejectment on payment of compensation to be governed by the law of limitation with regard to the execution of decrees, and that it was not intended to interfere with the general principle, that a man who sues on his cause of action and obtains a decree and allows that decree to become barred has no further remedy. With great respect, I am not prepared to follow the decision in *Kutti Ali* v. *Chindan* [1] in this case. The Second Appeal is dismissed with costs.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.*:—When a plaintiff has obtained in one suit based on some legal title, a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot in my opinion, be allowed to bring another suit for obtaining *the very same relief* against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. If he had failed in the first suit on the basis on which he had brought it, he might be entitled to claim the same relief in a second suit on another basis, if this latter basis could be treated as affording a different cause of action.

In *Chowakkuram Keloth* v. *Karuvalote Parkum* [2] the provisions of S. 6 of the Malabar Compensation for Tenants' Improvements Act and the decision in *Vedapuratti* v. *Vallabha Valiya Raja* [3], do not seem to have been considered and brought to the attention of the Court. I do not therefore, with great respect, feel bound to follow the decision in *Chowakkuram Keloth* v. *Karuvalote Parkum* [2].

A. V. V.

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1. (1900) I. L. R. 23 M. 629. 2. (1914) 29 I. C. 559.
3. (1902) I. L. R. 25 M. 300.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Avaran Marakarakath Kizhakkekath Kemalutti and another ... *Appellants** (*Plaintiffs*).

*v.*

Pulikkalakath Puthiakath Muhamad alias Ahammad and others. ... *Respondents* (*Defendants Nos. 1 to 3*).

Avaran Marakarakath Kizhakkekath Kemalutti *v.* Pulikkalakath Puthiakath Muhamad.

*Landlord and Tenant—Forfeiture—Denial of title, what constitutes—Tenancy for life, if liable to forfeiture—Power of Courts to grant relief against forfeiture for denial of title—Transfer of Property Act, S.* 111 *(g)—Principle of, if applicable to agricultural leases.*

In a suit to eject a tenant for life on the ground that the latter had forfeited his right by denying the title of the landlord, it was found that the only act relied on by the plaintiff as a denial of his title was the insertion of a recital in a sale-deed executed by the defendant of properties other than those comprised in the lease, that he was the absolute owner of the properties forming the subject of the lease.

*Held*, that there was not, in the circumstances of the case, such a direct and unequivocal denial of the tenancy as would, in law, work a forfeiture and that the suit was, therefore, not maintainable.

Per *Seshagiri Iyer, J.*:—Even in the case of a tenancy for life, a denial of the landlord's title by the tenant entails a forfeiture of the tenancy. Assuming that Courts have power to relieve against forfeiture in such a case that power will not be exercised unless the tenant proves that the denial was occasioned by the fraud or mistake of the landlord or by accident and that he was himself neither careless nor negligent.

Per *Seshagiri Iyer, J.*:—(*Napier, J.* dissenting): The principle embodied in S. 111 (*g*) of the Transfer of Property Act applies to agricultural leases.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 130 of 1916 preferred against the decree of the Court of the District Munsif of Parapanangadi in O. S. No. 3 of 1915.

*K. Kutti Krishna Menon* for Appellants.

*K. P. Govinda Menon* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J.*:—This is a suit for ejectment by a landlord on the ground that the tenant had forfeited his right by his denying the title of the plaintiff. The District Munsif held that the act complained of did amount to a disclaimer of the landlord's title and decreed possession. On appeal the Subordinate Judge agreed with the District Munsif that there was a disclaimer but held that as the lease was granted

* S. A. N. 686 of 1917. 5th December 1917.

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for the lifetime of the lessee, the disclaimer had not the effect of putting an end to the tenancy and that the suit was premature. He dismissed the suit upon that ground.

There are two questions for consideration in this Second Appeal. The first is, was there a disclaimer of title, secondly, whether the tenant has not forfeited the tenancy as the lease was for the lifetime of the tenant although he did deny the landlord's title. I shall dispose of the second point first.

The cases quoted by the Subordinate Judge have not much bearing upon this second question. I fail to see why the denial of title during the continuance of the period of tenancy should not work a forfeiture of the right. The Transfer of Property Act no doubt has no application in terms to this tenancy which is an agricultural one. But, the principle of S. 111, clause (g) is applicable to this case. Under the second sub-section of that clause it is enacted that the lessee renounces his character as such by setting up the title of a third person or by claiming title for himself. Mr. Justice Sadasiva Aiyar in *Abbakka* v. *Seshamma* [1] points out that under the Common Law of India a favourable construction should be placed upon the conduct of the tenant before he is adjudged to have forfeited his tenancy. I am prepared to accept this view in dealing with agricultural leases, but, I can see no justification for the view taken by the Subordinate Judge that leases for a term will enure for the full length of it notwithstanding the denial of title by the tenant. Therefore, if I come to the conclusion that there has been a disclaimer of title by the tenant I would take a different view of the case. I suggested in the course of the argument that even if there was a disclaimer, Courts may have power to relieve tenants from forfeiture. Many authorities were not cited on the question at the bar, but on considering the matter fully, I am not satisfied that if there is a denial of title, there is power in the Courts to relieve against forfeiture. Under the English Law there are at present still classes of cases which can be relieved against (a) for non-payment of rent the Common Law Procedure Acts of '52 and '60 and S. 4 of the Conveyancing Act of '92 provide for relief. (b) In cases of breaches of other conditions and covenants, the Conveyancing Acts of '91 and '92 declare the principles on which relief can be granted. No doubt it is pointed out in *Barrow* v. *Isaacs and Son* [2], that these various enactments

1. (1914) M. W. N. 915. 2. (1891) 1 Q. B. 417.

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have not exhausted the equitable jurisdiction of the High Court to relieve a defaulting tenant from forfeiture. Lord Esher in that case says, that in cases which are not provided for by the legislature, equity will come to the aid of the party only in three cases, *viz.*, fraud, accident or mistake. Then he proceeds to say that even if any of these elements are found, there will be no relief if the tenant had acted with great carelessness or negligently. The learned Master of the Rolls does not refer to the case of denial of title as one of the relievable cases, and I have not been able to find any authority in which relief was granted by Courts where the tenant had denied the landlord's title. Mr. Justice Sadasiva Aiyar in the case to which I already referred seems inclined to the view that all cases of forfeiture can be relieved against. Even accepting this broad proposition as being especially applicable to Indian conditions, I would require that where there has been a denial of title the tenant must prove in the language of Lord Esher that that denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. In the present case no attempt has been made to prove that the tenant has been misled. Therefore if I am driven to the conclusion that there has been a disclaimer of title, I would have decreed possession.

But, I am not satisfied that the Courts below are right in holding that there is a disclaimer of title. The disclaimer is said to be contained in Exhibit J. That is an assignment of jenm right by the defendant to a third party in respect of properties which undoubtedly belong in jenm to the defendant. In the course of describing the properties assigned and in excluding certain properties from the deed of assignment the defendant says that the excluded property belongs to him in jenm. It is true there is in this case an assertion of jenm right in respect of property now sought to be recovered, but the assertion is not addressed to the landlord, nor is that assertion followed up by transferring the particular property to a third party. There is no surrender of possession to a person claiming adversely to the jenm. It is only an incidental statement in a document which was intended to convey some other property. The question now is whether this incidental reference can amount to a denial of title. In the Transfer of Property Act the language is 'in case the lessee renounces his character as such by setting up a title in a third

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person or by claiming title in himself'. In this case he did not set up the title of a third person nor did he renounce his character as tenant. In ordinary parlance the expression 'renounce' would connote that some act is done to the knowledge of the landlord which was calculated to convey to him the impression that the tenant repudiated his title. The English authorities to which I shall presently refer seem to bear out the view that a casual reference like the present one will not have the effect of renunciation of title. As was pointed out in *Prag Narain* v. *Kadir Bakhsh* [1], the denial must be unequivocal and some act tending to the giving up of the relationship of tenant must have been committed. The authorities in England are to the same effect. In *Doe dem Graves* v. *Wells* [2], Lord Denman, Chief Justice, seems to suggest that there must be a betrayal of the landlord's interest and that the landlord should be placed in a worse condition, before he can insist upon forfeiting the tenant's lease. In *Doe dem Di Mon* v. *Parker* [3], it was held that a payment to a third person was not sufficient to put an end to the tenant's lease. *Doe d. Gray* v. *Stanion* [4], *Doe d. Pittman* v. *Sutton* [5], *Doe dem Williams and Jeffrey* v. *Cooper* [6] may be quoted in support of the same view. In Mr. William's book on Ejectment (2nd Edition), page 56, the law is thus stated: "In order to constitute a disclaimer something must be done by the tenant which amounts to a direct repudiation of the relationship of landlord and tenant, and is necessarily inconsistent with that relationship." In Woodfall on Landlord and Tenant, the statement is: "In order to make either a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it." The same proposition is stated in Cole on Ejectment also, page 41. In my opinion the collateral reference in a document intended to convey some other property is not enough to constitute a disclaimer of title. The principle is well settled that a tenant cannot acquire title by prescription against his landlord so long as he does not, to the knowledge of the landlord, repudiate the tenancy under which he held possession. Consequently the statement in a document executed to a third

1. (1913) I. L. R. 35 A. 145.
2. (1839) 10 Ad. and El. 427.
3. (1820) Gow. 180.
4. (1836) 1 M. and W. 695.
5. (1841) 9 Car. and P. 706.
6. (1840) 1 Man. and G., 135.

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party cannot ordinarily have the effect of starting adverse possession in favour of the tenant. The landlord therefore is not put in a worse position than he was when he let the property to the defendant. I therefore hold that there has been no denial of title. I would dismiss the Second Appeal. But, having regard to the conduct of the defendant, I do not think he is entitled to any costs in this Court.

Napier, J.

*Napier, J.* :—Two questions have been raised in this Second Appeal, the first, whether the alleged denial of title by the defendant operates to terminate his interest in the land and the second, whether, if there is a forfeiture, the Courts have power to relieve against it. The first question only has been considered by the Lower Appellate Court, and the view taken by the learned Judge on his reading of some decisions of this Court is that no denial of title by a person in the position of the defendant could not have that operation. I agree with the appellant that the learned Judge has misappreciated the effect of those decisions. But that does not dispose of the question.

It must be premised that there is no statutory law under which a denial of title by an agricultural lessee acts as a forfeiture. It is argued, and the argument is founded on several decisions of this Court, that the analogy of the Transfer of Property Act should be applied although such leases are specifically exempted. I have, speaking for myself, pointed out in another case* the danger of this method and, where statutory provision is absent, have preferred to seek another basis, namely, the English Law of Property. In doing so, we should in my opinion always bear in mind the difference in the origin of tenures and also the conditions peculiar to land tenures in this country.

I entirely agree with my learned brother that the only denial which we have to consider in this case is that contained in Ex. J, and this denial is certainly not made in any transaction dealing with the property, the subject of this suit, and is not addressed to the landlord. That is the state of facts as to the denial. The tenancy in question arises in a rather peculiar manner. Claims were made to this property, and other properties by the plaintiff and the defendant and a suit ensued. Their respective rights were settled by a razinama decree, under which

* [*Appayya Chetty* v. *Mahammad Beari* (1915) 29 M. L. J. 381, 386. Rep ]

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this property was "to be held by the 2nd and 3rd defendants until the death of both of them on Verumpattom right under the plaintiff without being surrendered." The defendants should pay a rental of Rs. 2 per year, and on the death of the defendants, the paramba should be taken possession of by the plaintiff or her representatives. The result of this decree was to create the relationship of landlord and tenant between the plaintiff and the defendants, the tenancy being one for the joint lives of the defendants. The defendants have certainly in Ex. J, declared that they held the property in jenm right, but they have not granted any lease inconsistent with their life-tenure, nor have they repudiated that tenure directly to the landlord.

It appears from an examination of the English cases that forfeiture for denial of title is based on two different principles when applied to two different classes of tenancies. The first is with regard to tenancies from year to year. In *Doe D. Graves* v. *Wells* 1, Denman, (L. C. J.) points out that with regard to tenures from year to year the words 'forfeiture' and 'disclaimer' are wrongly applied and that where a landlord brings an action to recover possession from such a tenant the evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its peculiar nature, was limited; and viewed in this light, he held that a verbal assertion that the fee was in the tenant even though made to the landlord's agent, was not a sufficient indication of the desire of the tenant to put an end to the tenancy in that mere words could not operate to affect an interest in law.

The origin of the doctrine as applying to tenancies *not* terminable at will, is to be found in 3 *Bacon's Abridgment,* p. 196, Estate for Life and Occupancy:—" Another way of forfeiture in a Court of Record, is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture." And then come the words explaining the limitation of this doctrine—" But, as by the feudal law the vassal was to be convicted of this denial, so in our law these acts which plainly amount to a

1. (1832) 10 Ad. and El. 427.

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denial, must be done in a Court of Record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause; but the denial of the tenure upon record could never be counterfeit, or be abused to any injustice; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law." That is the origin of the doctrine of forfeiture by denial, and it is hardly necessary to point out how unequivocal and direct a denial must be to come within the mischief of this doctrine.

The modern application of this doctrine is to be found stated in Woodfall's Law of Landlord and Tenant, 19th Edn., page 431. 'In order to make either a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it.' This statement of the law is taken word for word from the judgment of the Court of Exchequer in *Doe d Grey* v. *Stanion* [1], and was quoted as the basis of his judgment by a very eminent Judge, Fry J, in *Vivian* v. *Moat* [2].

It is clear therefore that a mere allegation of title which does not amount to repudiation cannot work forfeiture, and it is to be noted that in the Transfer of Property Act, this distinction has evidently been borne in mind, for the only disclaimers which operate under S. 111 cl. (g) are in cases where ' the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself.' It seems to me that both the words *repudiation* and *renunciation* require something a great deal stronger than a mere assertion not communicated to the landlord. It is impossible to lay down a hard and fast rule; but to my mind a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord (*Vide Doe d* v. *Williams* [3], where Lord Mansfield applies this test) and viewed in this light, the assertion will not come within its mischief.

1. (1836) 1 M. & W. 695 at 703. 2. (1881) 16 Ch. D. 730.
3. (1777) 2 Cowp. 622=98 Eng. Rep. 1273.

I am, therefore, of opinion that there was no denial of the title within the mischief of the doctrine. That being my conclusion on the first question, I do not think it necessary to enter into a consideration of the other point, whether a forfeiture for denial of title can be relieved against. I agree with the result of my learned brother's judgment.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Tirumalai Muthuveera Paramasiva Venkitaswami Naicker — *Appellant** (*1st Defendant.*)

*v.*

Muthusamy Pillai and another. — *Respondent* (*Plaintiff and 2nd Defendant*).

Venkitaswami Naicker v. Muthuswamy Pillai.

*Transfer of Property Act, S. 72—Right of mortgagee to recover expenses incurred in protecting mortgagor's title, by separate suit—Minor—Step-mother, if entitled to act as guardian—Liability of minor on a bond executed by guardian for proper purposes.*

A mortgagee in possession instituted criminal proceedings against his tenants who cut off and carried away the crops on the land asserting the title of a stranger as owner. The mortgagor died leaving an only minor son and the step-mother of the minor acting as his guardian executed a bond in favour of the mortgagee undertaking to pay the expenses of the criminal prosecution. It was found that the expenses incurred in the criminal prosecution were necessary and that the mortgagee acted as a prudent owner in incurring them. In a separate suit on the bond against the minor son of the mortgagor, it was contended on his behalf that suit was not maintainable by reason of S. 72 of the Transfer of Property Act, that the step-mother was not a guardian of the minor and had no power to bind him and that no decree could be given against the minor personally or against his estate.

*Held*, (1) that S. 72 of the Transfer of Property Act was no bar to the suit, as the terms of that section were merely permissive and did not make it obligatory on the mortgagee to add the expenses incurred by him to the mortgage money and to insist on being paid those sums before redemption; *Bavanna* v. *Balagurivi* [1], dissented from;

(2) that the step-mother of the minor was competent to act as his guardian in the absence of nearer relations; and

(3) that though the minor could not be charged with personal liability, his estate was liable for the debt due under the bond.

*Indar Chunder Singh* v. *Radha Kishore Ghose* [2], distinguished. *Subramania Iyer* v. *Arumuga Chetty* [3], *Duraisami Reddi* v. *Muthial Reddi* [4], *Krishna Chettiar* v. *Nagamani Ammal* [5]. Relied on.

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* S. A. No. 1135 of 1916 — 25th October 1917.

1. (1898) 9 M. L. J 177.
2. (1892) I. L. R. 19 C. 507. (P.C.)
3. (1902) I. L. R. 26 M. 330.
4. (1908) I. L. R. 31 M. 458.
5. (1915) I. L. R. 39 M. 915, 917.

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Second appeal against the decree dated 29th February 1916 of the Court of the Temporary Subordinate Judge of Madura in A. S. No. 10 of 1916, preferred against the decree of the Conrt of the Addl. District Munsif of Dindigul in O. S. No. 324 of 1913.

*K. Jagannadha Aiyar* and *K. Balamukunda Aiyar* for Appellant.

*A. Krishnaswami Aiyar* for Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J.*—The plaintiff obtained a usufructuary mortgage from the father of the 1st defendant in 1906. He was in possession for three years. After that period, the tenants whom he had let into possession colluded with one Sekhomoni Ammal, a neighbouring Zamindarini and carried away the crops on the land without paying the landlord's share. Thereupon the plaintiff instituted criminal proceedings against the tenants and they were convicted. For the expenses incurred in conducting the criminal proceedings the second defendant who is the step-mother of the 1st defendant executed a document, which is styled a vartamanam, in December 1909. The present suit is brought against both the defendants on that document. The 1st defendant denied the right of the 2nd defendant to be his guardian, and contended that the criminal litigation was not conducted *bona fide* and that he is not liable for the expenses incurred. The District Munsif came to the conclusion that the criminal prosecution was not necessary for protecting the interest of either the mortgagor or the mortgagee, that the expenses incurred were not covered by any of the provisions of S. 72 of the Transfer of Property Act, and that under any circumstance the plaintiff is not entitled to any decree against the 1st defendant who was a minor at the time of Exhibit A. He dismissed the suit.

In appeal the Subordinate Judge differed from the District Munsif upon the question whether the criminal proceedings were necessary to protect the estate. His finding is that as Sekhomoni Ammal disputed the ownership of the defendants it was necessary to have conducted criminal proceedings in order to protect the estate. He also held that the document executed by the second defendant was binding upon the 1st defendant. He gave a decree to the plaintiff for Rs. 800. The decree is personal and does not charge the property of the 1st defendant.

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No serious attempt was made before us to impeach the finding of the Subordinate Judge that the expenses of the criminal prosecution were necessary. If we heard the case on the facts, we may not have come to the same conclusion as the lower Appellate Court has done. Under S. 72 cl. (c) of the Transfer of Property Act, the mortgagee in possession may add any moneys spent in supporting the mortgagor's title to the property. It is open to doubt whether an expensive criminal litigation carried on for the purpose of getting convicted certain persons who had reaped and carried away the crops on the land can be regarded as a proceeding necessary to support the title of the mortgagor. But, apparently, the accused were set up by a rival claimant, and it appears from the evidence that the 2nd defendant requested the plaintiff to take criminal proceedings to protect the 1st defendant's title to the property. As we said before, the matter has not been seriously argued before us, and we are not prepared to differ from the Subordinate Judge on this point.

The further question is whether the expenses incurred were reasonable. The mortgagee in possession must act as a prudent owner. That is a question of fact on which the Subordinate Judge has given a finding which has not been seriously attacked in this Court. We are bound by that finding. On these two findings there can be no doubt that the mortgagee is entitled to be indemnified in respect of the expenses incurred by him. The cases of *Godfrey* v. *Watson* [1], *Sandon* v. *Hooper* [2], and *Fenton* v. *Blackwood* [3], lay down this proposition in clear terms.

The next question is whether a separate suit is maintainable in respect of the expenses. Mr. Jaganatha Aiyar contended that the only remedy open to the mortgagee, who has spent money, under cls. (a) to (e) of S. 72, is to add them to the moneys due under the mortgage and to insist upon being paid those sums before redemption, and not bring a separate suit. The language of S. 72 is against this contention. The words are, "the mortgagee *may*, in the absence of a contract to the contrary, add such money to the principal money." It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the Legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person

1. (1747) 3 Atk. 517. 2. (1843) 6 Beav. 246.
3. (1870) L. R. 5 P. C. 167.

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who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee, the legislature apparently intended to put him on a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing to the moneys a charge upon the property. The use of the word *may* shows that it is an additional remedy conferred upon the mortgagee and that it is not the sole remedy. The learned vakil for the appellant has been able to find a case which certainly supports him in his contention. In *Bavanna* v. *Balaguini* [1], it was held by Justice Subramania Aiyar and Justice Boddam that the only right secured under S. 72 is to add the amount to the mortgage money. This judgment has not been referred to or followed in any of the subsequent cases in this or in any other High Court. With all respect to the learned Judges, we are unable to agree with their conclusions. There is no discussion of the section of the Act nor is there any citation of authorities in support of the proposition laid down by the learned Judges. Mr. Jagannatha Aiyar referred us to *McEwen* v. *Crombie* [2]. One preliminary observation may be made as regards that case, and that is the learned Lord Justices had not to construe any Act of Parliament as we have to do. Lord Justice Cotton points out that the right of redemption is itself an indulgence granted to the mortgagor, and that he would not be allowed to exercise that right except on condition of paying the mortgagee any expenses which have been properly incurred. He adds that the mortgagee's right to bring actions for the debt is not permissible because the condition imposed by a Court of Equity is not in the nature of a contract which can be independently enforced. As we understand the learned Lord Justice, he seems to have laid down that the Common Law Courts should not entertain an action for the debt due in a matter which is purely within the jurisdiction of the Chancery Court and which liability the Chancery Court is alone competent to impose as a condition of redemption. This principle can have no application to India. Having regard, as we said before, to the language of S. 72 of the Transfer of Property Act, we are unable to agree with the contention that the only remedy open to a mortgagee is to insist upon being paid at the time of redemption. Moreover, in the present case, it cannot be said that there was no considera-

1. (1899) 9 M. L. J. 177. 2. (1883) 25 Ch. D. 175, 177.

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tion for the bond given by the 2nd defendant to the plaintiff. Undoubtedly money has been spent on her behalf and apparently at her request, and I see no reason for holding that the bond sued on is not supported by consideration. The decision of the Allahabad High Court in *Imdad Hasan Khan* v. *Badri Prasad* [1], impliedly holds that there is an independent cause of action for expenses incurred under any of the clauses of S. 72. We must therefore overrule this contention.

One other minor contention may be disposed of before dealing with the principal point argued in the case.

The learned Vakil for the appellant argued that as the second defendant is only the step-mother, she was not the natural guardian of the 1st defendant and therefore her bond will not bind him. The question was not very fully argued, and therefore we do not propose to express any definite opinion upon the question whether the step-mother is a guardian under the Hindu Law. There is one case in *Lukmee* v. *Umur Chand Deo Chund* [2], and another in the North Western Provinces in *Nunkoolal* v. *Shoodra* [3], in which it has been held that a step-mother is entitled to be the guardian of her step-son. On the other hand, we have *Maharanee Ram Bunsee Koonwaree* v. *Maharanee Soobh Koonwaree* [4], where it was held that she is not. I do not think the fact that she is not the heir to her step-son, is conclusive on the question. As at present advised we are unable to think that in the absence of nearer relations she is not entitled to act as the guardian of her step-son. In *Sunder Moni Dai* v. *Bansidhar Patnaik* [5], Mookerjee and Beachcroft, JJ. appointed the step-mother of a minor to be his guardian. In the present case the step-mother was the sister of the 1st defendant's own mother. We therefore think that no valid objection can be raised on the ground that she is not entitled to act as guardian.

The main question is whether on a contract by the guardian of a Hindu, the minor's person or his property can be charged with liability. We feel no doubt that the decree against the 1st defendant personally is wrong. It was pointed out by the Judicial Committee in *Waghela Rajsanji* v. *Sheikh Masludin* [6], that a guardian cannot enter into a transaction so as to charge the minor

1. (1898) I. L. R. 20 A 401.
2. 2 Bom. Sud C. Rep 144.
3. N. W. P. Sud. C. Decisions for 1847, p. 115 cited in Trevelyan on Minors, 5th Edition, p. 51.
4. (1867) 7 W. R. 321.
5. (1912) 16 I. C. 900.
6. (1887) I. L. R. 11 B. 551

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on attaining majority, with personal liability. Therefore the decree is wrong, in so far as it makes the 1st defendant personally liable. But, we have jurisdiction to see that a proper decree is passed, although there is no memorandum of objections or cross appeal before us. Now the question is whether the property of the minor should be held liable. Mr. Jagannatha Aiyar laid emphasis upon the decision of the Privy Council in *Indur Chunder Singh* v. *Radha Kishore Ghose* [1], and argued that unless the guardian created a charge upon the property, no decree should be passed against the estate of the minor. It is necessary to examine this decision very carefully to see what it was that was actually decided by the Judicial Committee in that case. In the first place, the contract although by the guardian of the minor, was not entered into in that capacity. A renewal of a lease was taken in the name of the mother and grand-mother of the infant. The description in the document is that they were the mother and grand-mother of the boy. The document does not purport to have been executed as guardians. Further it was a fresh contract entered into by the ladies and in the litigation that ensued, the minor was sought to be charged with liability for this contract. Lord Hannen delivering the judgment of the Board points out, in more than one place, that the transaction was not entered into as guardians of the minor. In page 512 it is said: "the lessees (referring to the mother and the grand-mother) undertook themselves to pay the rent". In page 513 it is stated that the plaintiff was asking the minor "to fulfil the obligations entered into by the lessees in their own name." Referring to the earlier case of *Hanooman Prasad Panday* v. *Mussamat Babooee Munraj Konwaru* [2], His Lordship observes "Further the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate." The view taken in *Indur Chunder Singh* v. *Radha Kishore Ghose* [1] comes to this, that with reference to transactions entered into personally by the guardian of the minor, his estate on his attaining age, should not be held liable. We do not think this decision should be extended to cases which are not covered by the facts proved in that case. After *Indur Chunder Singh* v. *Radha Kishore Ghose* [1] this Court had to deal with the question in a number of cases. In *Subramania Aiyar* v. *Armuga Chetty* [3] it was held that on a bond executed by the guardian the minor's estate

1. (1892) I. L. R. 19 C 507. 2. (1856) 6 M. I. A. 393.
3. (1902) I. L. R. 26 M. 330.

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can be made liable. *Duraisami Reddi* v. *Muthiah Reddi* [1] decides the very question we have now to decide. *Regella Jogayya* v. *Nimusha Kavi Venkata Ratnamma* [2], though it is not a case of a minor, enunciates the same principle. In *Sanka Krishnamurthi* v. *The Bank of Burmah* [3] the present Chief Justice points out that by applying the principle of subrogation, the estate of the minor can be proceeded against for a proper debt incurred on behalf of the minor. Lastly we have *Krishna Chettiar* v. *Nagamani Ammal* [4]. It lays down that a minor's estate can be made liable for a debt contracted by the guardian. This last case was on a promissory note by the guardian. Although a great deal may be said in favour of the position that the Hindu Law liability should not be extended to cases under the Negotiable Instruments Act, there can be no question that in case of bonds like the present one, the liability of the minor for debts properly incurred on his behalf can be charged against the estate. We see no reason for not following this *catena* of decisions in this Presidency and for referring the case to a Full Bench. In a very recent case reported in *Swaminatha Aiyar* v. *Srinivasa* [5], Justice Abdur Rahim and Justice Spencer held that on a personal contract entered into by a trustee the minor's estate should not be held liable. This decision has been dissented from by Kumaraswami Sastri, J. in *Ammalu Ammal* v. *Namagiri Ammal* [6], but Sadasiva Aiyar, J., is inclined to agree with it. It is not necessary for us to express any opinion one way or the other upon the actual conclusion come to in the case. The learned judges point out that the case of a guardian of an infant stands on a different footing from the case of a trustee. As Mr. Krishnaswami Aiyar suggested, a trustee has the legal estate in him and consequently any contract entered into by him must *prima facie* be taken to be chargeable only against him personally or against the estate in his hands. The guardian of a minor occupies a different position, for as he enters into a contract on behalf of the minor who is the legal owner of the property, he must be deemed to have intended to charge the estate of the minor with liability. In this view *Swaminatha Aiyar* v. *Srinivasa* [5], does not affect the present case. We are therefore of opinion that the estate of the minor is liable for the debt sued on. The decree of the Subordinate Judge

1. (1908) I. L. R. 31 M. 458.
2. (1910) I. L. R. 33 M 492.
3. (1911) I. L. R 35 M. 692.
4. (1915) I. L. R. 39 M. 915.
5. (1917) 32 M. L. J. 259.
6. (1917) 33 M. L. J. 631.

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must be modified by stating that the minor is not personally liable but only his property. With this modification the Second Appeal must be dismissed with costs.

*Napier, J*:—I agree.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Amir Bi Bi ... *Appellant** (*Plaintiff*)

*v.*

Arokiam and others ... *Respondents* (*Defendants*).

Amir Bi Bi v. Arokiam

*Arbitration—Reference to, without intervention of Court—Oral award—Award not made a rule of Court, if effective to transfer property—Hypothecation bond of less than* 100 *Rs. in value—Award, effect of, in India.*

In pursuance of oral submission to arbitration by certain members of a family of their claim to various properties, an oral award was given by the arbitrators by which a hypothecation bond of the value of less than 100 Rs. was allotted to the plaintiff who, however, was not the person in whose favour the bond had been executed. The award was not made a rule of Court nor did the holder of the bond assign it to the plaintiff. In a suit on the bond by the plaintiff, *held* that the award had the effect of passing title to the plaintiff who was therefore entitled to sue on the bond.

It is not essential to the validity of an award that it should be in writing.

Per *Seshagiri Aiyar, J.* (*Napier, J.* contra) In India an award made on a reference to arbitration without the intervention of the Court has the effect of a judgment, though not made a rule of Court.

Second Appeal against the decree dated 22nd December 1915 of the District Court of Salem in A. S. No. 56 of 1915 preferred against the decree of the Court of the Principal District Munsif of Salem in O. S No. 188 of 1914.

*K. V. Krishnaswami Aiyar* for *T. M. Krishnaswami Aiyar* for Appellant.

*C. Madhavan Nair* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J.*—This is a suit on a hypothecation bond. The plaintiff alleges that in a family settlement between herself, her mother-in-law and brothers-in-law, the arbitrators chosen by them are alleged to have given an oral award under which this bond and some other bonds were allotted for her share. The hypothecation bond was originally executed to her father-in-law. She now sues on it.

* S. A. No. 1374 of 1916. 16th November 1917.

Amir Bi Bi *v.* Arokiam.

Seshagiri Aiyar, J.

The only plea of the defendant with which we are concerned, relates to the unsustainability of the suit on the ground that even if the award was true, as it was not followed by the execution of a conveyance, plaintiff is not entitled to maintain a suit to recover the money due under the bond. The learned District Judge has accepted this plea and has dismissed the suit. I am unable to agree with him.

There are two aspects of the question; one is that the award itself operates to vest the property in the plaintiff, and the other, an award not being one of the instruments specially dealt with in the Transfer of Property Act no writing or registration is necessary to give validity to the award. Upon the first question it may now be taken as settled law that an award may be oral. *Kula Naghabushanam* v. *Kula Seshachalam* [1], *Savlappa* v. *Devchand* [2], and Second Appeal 837 of 1916 have held that an oral award is as binding upon the parties as a written award. The further question is whether the award of an arbitrator is only a contract between the parties who submitted their disputes to his decision, or whether it has the attributes of a judgment as well. There are no doubt *dicta* in certain cases that an award of the arbitrators must be regarded as in the nature of a contract. These are cases in which it was held that the award can be varied like a consent judgment, in certain particulars. I do not think that these authorities lay down that an award has no greater effect than a contract of the parties. It is true that under the English law, as pointed by Russell on Awards at page 311, "An award of the arbitrators must be followed up by execution of the necessary documents to give efficacy to it." As Mr. Krishnaswami Iyer pointed out, an examination of the cases cited as authorities for this proposition do not fully bear out this statement of the law. For example the case of *Johnson v. Wilson* [3], was one in which a further act would have been required to give validity to the decision even if it had been regarded as one passed by a Court of law. But there are some cases which bear out the view enunciated. I do not think that these decisions should be followed in India. In this country, decisions by Panchayats have been accepted as binding long before the regular Courts were established by the British Government and there is nothing in the second schedule to the Code of

1. (1863) 1 M. H. C. R. 178 at p. 180. 2. (1901) I. L. R. 26 B. 132 at p. 135
3. (1740) Willes 248=25 Eng. Rep 1156.

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Civil Procedure to suggest that the decisions of the arbitrators are not valid until they are followed by the execution of documents. Of course in cases relating to specific performance or where one of the parties sues another for the enforcement of a particular act the decree of the Court would still leave the parties under an obligation to perform the directions given in the judgment of the Court. But where a complete adjudication of the rights of the parties is given by the judgment, the parties are concluded by it and it is not incumbent upon either of them to take further steps unless they be the modes prescribed by processual law to give effect to the decree of the court. This is undoubtedly the position so far as the judgments of the ordinary tribunals of the country are concerned. Is the position of the arbitrators different? In my opinion the fact that the parties have chosen to invoke the aid of a private tribunal to settle their differences should not make any difference as regards the efficacy of the decision come to by such a tribunal. So long as the resort to such a tribunal is authorised by the law of the country, I can find no justification for not giving the same finality to the pronouncement of such a tribunal as is accorded to that of the ordinary tribunals. The fact that in submitting reference to arbitration no court-fee is paid does not in the least affect the question. There are authorities which support the conclusion at which I have arrived. In *Muhammad Newazkhan* v. *Alam Khan* [1] the question related to the applicability of the principle of res-judicata to awards of arbitrators. Their Lordships of the Judicial Committee point out that the fact that no application was made to make the award a decree of court did not render the award any the less valid. The logical result of this conclusion is to regard the award as binding in its nature as a judgment of court. In *Sornavalliammal* v. *Muthayya Sastrigal* [2] the learned judges point out that the award is not simply a contract between the parties but had the effect of conferring title upon them. In *Jadunath Choudry* v. *Kaileschandra Bhattacharya* [3] it was held that the award can be pleaded in bar to a suit relating to the subject-matter covered by the award. *Sheo Narain* v. *Beni Madho* [4] is also to the same effect. See also *Krishna Panda* v. *Balarama Panda* [5] and *Subbaraya Chetti* v.

1. (1891) I. L. R. 18 Cal. 414.
2. (1900) I. L. R. 23 M. 598.
3. (1909) I. L. R. 37 C. 68.
4. (1901) I. L. R. 23 A. 285.
5. (1896) I. L. R. 19 M. 290.

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*Sadasiva Chetti* [1]. In *Bhau Rao* v. *Radhabai* [2], the learned Judges relying upon the *dictum* of the Judicial Committee in *Muhammad Newazkhan* v. *Alam Khan* [3] came to the conclusion that no further instrument need be executed to give validity to the award of the arbitrators. I am prepared to follow this decision. As regards *Talwar Singh* v. *Bahori Singh* [4] the learned Judges themselves point out that something had to be done in pursuance of the decision of the arbitrators. It is upon that ground they distinguish *Sornavalliammal* v. *Muthayya Sastrigal* [5], I am therefore of opinion that by virtue of the award of the arbitrators the right to recover upon the mortgage bond accrued to the plaintiff.

As I stated at the outset, there is also another aspect from which the award can be viewed. It has been held that oral partitions can be enforced notwithstanding the fact that there is no writing or registration to evidence such a partition. See *Thiruvengadachariar* v. *Ranganath Iyengar* [6], *Alamelu Ammal* v. *Balu Ammal* [7], *Latchmiammal* v. *Gangammal* [8], and *Gyannessa* v. *Mabarakannessa* [9]. It was also held that an oral dedication of property to an idol is valid. See *Pallayya* v. *Ramavadhanulu* [10]. The principle of these decisions is that the Transfer of Property Act is not exhaustive of all modes of transfer and if there is a transfer of property which does not come within the special modes discussed in the Transfer of Property Act, the conditions as to writing and registration prescribed by the Act have no application. The mode of transfer by an award is not dealt with by the Transfer of Property Act. Consequently the decision of the arbitrators by which they are said to have given the mortgage bond to the present plaintiff is enforceable between the parties if there is an oral award. In this view also plaintiff would have acquired a title to sue upon the hypothecation bond.

For both these reasons I am of opinion that the judgment of the District Judge must be reversed and the appeal should be sent back to him for disposal on the merits. Costs to abide the result.

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1. (1897) I. L. R. 20 M. 490.
2. (1909) I. L. R. 33 B. 401.
3. (1891) I. L. R. 18 C. 414.
4. (1904) I. L. R. 26 A. 497.
5. (1900) I. L. R. 23 M. 593.
6. (1903) 13 M. L. J. 500.
7. (1914) 28 M.L. J. 685.
8. (1910) I. L.R. 34. M. 72
9. (1897) I. L. R. 25 C 210.
10. (1903) 13 M. L. J. 364.

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*Napier, J*: This Second Appeal arises out of the refusal of the District Judge of Salem to recognise an award as passing title to the appellant in the suit and thus enabling her to sue a third party on the strength of it. The case before the court was that there was an oral submission to arbitration by certain members of a family of their claim to various properties and that an oral award was given by the arbitrators by which, among other arrangements, the property in question in the suit was given to the appellant although she was not a party to the submission and that the value of the property is below Rs. 100. On these facts it is contended before us that the award operated to vest title in her and the contention was sought to be supported on two grounds, first, that the award operated as a judgment, secondly, that the property being under Rs. 100 in value, the arbitrator nominated by the parties had authority to transfer it orally and this award had had that effect.

It is undoubtedly settled law that an oral award is as binding between the parties as a written award, though the further question might arise whether even if a written award could operate as a judgment, an oral award would have the same effect. The contention that an award operates as a judgment and the further contention that *qua* judgment it can pass title, is one that would have such far-reaching results that I think it necessary to examine it carefully.

The first difficulty to be met is as to the effect of a judgment alone as passing title. The primary effect of a judgment is to give a right to have the adjudication of the court embodied in a decree under S. 33 of the Civil Procedure Code. 'Judgment' is defined in the Civil Procedure Code as "the statement given by the Judge of the grounds of a decree or order" and I know of no process by which a judgment can be rendered effective without a decree or order having been passed. I must assume therefore that when the word 'judgment' is used it is intended to convey the idea of a decree or order made by a person constituted by agreement of the parties as a Court *ad hoc*. Assuming that this is so I am unable to see how the matter is carried any further. Decrees and orders of a court have to be executed by the court and elaborate provisions are contained in the Civil Procedure Code regulating the procedure. It has not been contended before us that the provisions of Part II of the Code or Order 21 are applicable to awards by an

arbitrator, and it would be a strange result that whereas execution of a decree entitling a person to recover property has to be by delivery of the property specifically decreed under S. 51, the award of an arbitrator should be a judgment and a decree capable of passing property without delivery.

Another difficulty in the way of this contention is that no period of limitation would affect the efficacy of this judgment or decree. The only provisions in the Limitation Act which touch awards are Articles 45, 46, and 158. The first has a reference to a suit to contest an award, the second to a suit to recover any property comprised therein and the third to an application to set aside an award under the second schedule of the Civil Procedure Code. None of these articles has any application.

The next difficulty is that the Code expressly provides a method by which an award made on a reference to arbitration without the intervention of a court may *become* a judgment within the meaning of the Code. That is clause 21 of the second schedule which provides for the court pronouncing judgment and a decree following. On such a decree execution would follow and limitation would apply. This is, of course, the only method by which execution can be procured on an award, and that being so, I cannot see how an award on which a Court has not pronounced judgment and issued a decree can be a judgment capable of passing rights. In *Krishna Panda* v. *Balarama Panda*, [1] the learned Judges used the phrase "an award duly passed in accordance with a submission of the parties is equivalent to a final judgment," but that language is only used as introductory to the proposition that "to give effect to it the subsequent consent or approval of neither party is required." I do not think that this dictum helps the appellant on this point. I am unable to find any other case in this court where language of this sort has been used. The case in *Jadunath Chowdry* v. *Kailaschandra Bhattacharjee* [2] was also relied upon. In that case an award on a private reference was held to be sufficient answer, to a suit to recover property. Their Lordships however did not put it on the ground that the award operated as a judgment, but on the ground that the value of the property being under Rs. 100, the provision of the Registration Act of 1908 did not prevent title passing. The case reported in *Sheo Narain*

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1. (1896) I. L. R. 19 M 290. 2. (1909) I L. R. 37. Cal. 63.

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v. *Beni Madho* [1] has also no bearing on this point and nothing was said in it to suggest that the award was a judgment.

Reference was made to the English Law on the subject and I agree that if authority could be found in England for the proposition that an award on a voluntary reference operated as a judgment, the argument of the learned vakil for the appellant would receive great support, for it must be borne in mind that under the English procedure a judgment is not merely the statement given by the judge but is the formal adjudication on which execution issues. The authority is however all the opposite way. It would be sufficient to refer to S. 12 of the Arbitration Act which deals with reference by consent out of court, and provides that an award on such submission may by leave of the Court or a Judge be enforced in the same manner as a judgment or order to the same effect, a provision analogous to that contained in clause 16 of the second schedule to the Civil Procedure Code. It is common knowledge that the Courts of Law in England have in times past strenuously opposed the idea that the parties could by any agreement between themselves oust the jurisdiction of the Court. The only method by which the arbitration proceedings could be made in any way efficacious for process by the Court was by making the submission a rule of Court. When that had been done the Court would, in a proper case and on application made, enforce an award by attachment as proceedings in contempt. No formal execution for the recovery of the money or land would however issue even where a submission had been made a rule of Court, and of course far less so where there had been no rule. After the passing of the Judgments Act of 1838 the practice began in cases where submission had been made a rule, of applying after the passing of the award to the Court for a rule calling upon the party to show cause why he should not pay the amount of the award, (*Vide* Russell on Arbitration, page 352) and on this rule execution would issue. An old case, *Owen v. Hurd* [2] is instructive on the difference between awards made without a rule of court and those with. In that case there had been a submission between A and B which had been made a rule of Court The arbitrator had not however proceeded and C who was the person really interested agreed with B for a second arbitration and they appointed an

1. (1901) I. L. R. 28 A 285. 2. (1788) 2 T. R. 643=100 Eng. Rep. 346.

arbitrator. This submission was however not made a rule of court. On the arbitrator making the award, attachment was moved against one of the parties for not obeying the award. But the court pointed out that the submission on which the award had been made had not been made a rule of court and stated that the award was a mere nullity. This proposition may be too broad but it is sufficient to dispose of any suggestion that such an award could operate as a judgment, while a modern case is indicative of the same idea even after the passing of the Arbitration Act. The case is *In re a Bankruptcy notice* [1]. The party to an arbitration procured an order under S. 12 of the Arbitration Act that award be enforced in the same manner as a judgment, and then applied to the Registrar in Bankruptcy to issue a bankruptcy notice, he having served on the debtor a notice requiring him to pay the judgment-debt in accordance with the terms of the judgment as required by S. 4 cl. (g.) of the Bankruptcy Act, 1883. The Court of Appeal upheld the Registrar's refusal to do so and Vaughan Williams, L. J. states the law as follows ; "All that is done by S. 12 of the Arbitration Act is to give the successful party under the award the right to enforce it as if it were a judgment and I have grave doubts whether there was any jurisdiction to enter judgment in this case," while Fletcher Moulton, L. J. says as follows :—"The arbitration was one outside the Court altogether. The powers of the Court in such a case are defined by S. 12 of the Act which provides that an award on a submission may by leave of the Court be enforced in the same manner. But it gives no power to turn such an award into a judgment." This expression of opinion as to the present state of the law even after the passing of the Arbitration Act is conclusive as to the view which the English Courts take as to the character of an award made on a voluntary submission. For the above reasons I am satisfied that even if an award is equivalent to a judgment for some purposes in the sense that it may have the same effect as a judgment has in barring suits, it is not a judgment in any real meaning of the word, far less is it a decree.

The next question is whether the award could pass title without any further action by the parties on any other footing. In my opinion the appellant is entitled to succeed on this point, both on principle and on authority. The parties by their submission agreed

1. (1907) 1 K. B. 479.

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Napier, J.

to be bound by the decision of the arbitrator and constituted him their agent for the purpose of doing such things as are specifically or by implication embodied in the terms of the submission. This doctrine is laid down by Lord Ellenborough in *Hunter* v. *Rice* [1]. In that case an arbitrator as on a voluntary submission had awarded that the tenant should deliver to the landlord certain hay stacked on the premises. The landlord assuming that title has passed to him brought a suit against the tenant for conversion. The court held that on the terms of the award no title passed and his remedy was on the award. Lord Ellenborough in delivering judgment said as follows :—"There is a difference between property awarded to be transferred by the owner and the property which is actually transferred by the contract of the owner through the medium of his agent." We have here, apart from the distinction, the foundation of an arbitrator's powers, namely, contract and agency. There are limitations to the exercise of these powers due to the formal requirements of the law, such as, in England, requirements of a conveyance by deed for land and, in India, the provisions of the Transfer of Property Act and the Registration Act but, outside these limitations it must be held that an arbitrator legally authorised can carry out the directions of the parties as their agent.

Apart from principle, there is abundant authority, *vide* *Subbaraya Chettiar* v. *Sadasiva Chettiar* [2] and *Sornavalliammal* v. *Muthayya Sastrigal* [3]. In this latter case the court pointed out the same distinction as was the basis of the judgment in *Hunter* v. *Rice* [1]. The language is "The award does not provide for the execution of any instruments between the parties or the performance of any conditions precedent to the plaintiff's enjoyment of the land. In other words the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to take possession thereof from that date," and the same view was taken in *Sheo Narain* v. *Beni Madho* [4]. For the above reason I think the appeal must succeed. It is to be noted that it was only ascertained in this Court that the property was under the value of Rs. 100; for the District Judge

1. 15 East's Term Reports, 102.
2. (1897) I. L. R. 20 M. 490.
3. (1900) I. L. R. 23 M. 593.
4. I. L. R. 23 All. 285.

bases his refusal to accept the award as conferring title on the absence of a fully registered instrument, which have only reference to the requirements of S. 54 of the Transfer of Property Act. I agree with the order proposed by my learned brother.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, *Chief Justice*, MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Mannath Veettil Itti Panku Menon ... *Appellant** (*2nd Defendant*)

*v.*

Thazheth Meladem Dharman Achan Avergal, and Keizhekkemeladathil Dharman Achan. ... *Respondents* (*Plaintiff and 1st Defendant.*)



*Contract—Stranger—Right of suit — English Law—Applicability—Malabar Law—Kanom—Grant of Melcharth to third party—Prvision for payment of barred arrears of rent to Jenmi after redemption—Assignment of melcharth to kanomdar—Validity—Jenmi's suit to enforce provisions of, as against Kanomdar requiring assignee to pay arrears to jenmi—Maintainability—Limitation Act, Art.*—62 ; *Sec.* 18.—*Applicability.*

Plaintiff, who had granted a kanom to the 2nd defendant in 1893, executed in 1904 a melcharth in favour of the 1st defendant by which the latter became entitled to redeem the 2nd defendant on the expiry of his kanom and to hold the lands himself on a fresh kanom for 12 years commencing from the date of his recovering possession of the properties. The kanom. debt payable to the 2nd defendant on redemption was subject to reduction by the amount of the arrears of rent due from the 2nd defendant to plaintiff under the kanom even though a suit for the arrears had become barred and the 1st defendant was required on redemption to deduct this amount from the kanom debt and pay it over to plantiff. By the melcharth the 1st defendant was also required to pay rent from the date of the expiry of the term of the kanom in favour of the 2nd defendant even if there was delay in getting possession. The 1st defendant did nothing till 1909 when he assigned his rights under the melcharth to the 2nd, stipulating at the same time. that the latter should pay plaintiff the arrears of rent due under the kanom which he had bound himself to collect and pay The melcharth was recognised by plaintiff by a notice in 1912 demanding payment of the arrears from the 2nd defendant. In a suit instituted in 1913 by plaintiff against defendants for payment of arrears of rent from 1896-1905 and 1910-13,

*Held* per *Chief Justice and Kumaraswami Sastri, J.* (*Bakewell, J.* dissenting) by virtue of the assignment of the melcharth, the amount of the arrears of rent was

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* L. P. A No. 19 of 1917. 5th October, 1917.

Mannath Veettil Itti Panku Menon v. Thazheth Meladem Dharman Achan.

money had and received by the 2nd defendant for plaintiff's use and plaintiff was entitled to sue him for its recovery ; and no portion of the plaintiff's claim was barred.

*Per Chief Justice* and *Bakewell, J* (*Kumaraswami Sastri*, J. dissenting) The rule of English law that a contract cannot be enforced by a person who is not a party to it is applicable to India.

*Jamna Das* v. *Ram Autar Pande* 1, followed.

Per *The Chief Justice* :—Even if the melcharth contained an implied covenant against assignment, plaintiff could not by reason of his recognition of the assignment to the 2nd defendant question its validity.

By reason of the assignment 2nd defendant became bound to redeem the old kanom and to hold the demised lands for a further term for the old kanom debt less the amount of arrears which were due at the date of redemption, and, plaintiff when he came to know of the assignment, became entitled to insist on his so redeeming the old kanom and to treat the arrears as money in the 2nd defendant's hands had and received to plaintiff's use and to recover it under Art. 62 of the Limitation Act and he must be taken to have exercised that right when he sent the notice of demand in 1912.

Even if the redemption should be treated as having taken place on the date of the assignment of the melcharth, under Art. 62 read with S. 18 of the Limitation Act, time would not run against plaintiff so long as he was kept in the dark as to the manner in which his rights had been affected by the assignment of the melcharth.

Per *Kumaraswami Sastri, J*:—Inasmuch as plaintiff recognised both the melcharth and the assignment as valid and subsisting transactions at the date of the suit, the melcharth was not at the date of the assignment invalid and inoperative by reason of the failure of the 1st defendant to redeem the kanom, and the rights of the parties must be dealt with on the footing that the 2nd defendant remains liable for all legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth.

It is not open to the 2nd defendant to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by it and plaintiff was entitled to sue on the contract between the defendants.

Whether the claim of plaintiff is based on his right to sue on the arrangements evidenced by the melcharth and its assignment or on the ground that the kanom must be deemed to have been redeemed when the assignment of the melcharth was assented to by plaintiff, his claim is not barred inasmuch as in the former case he would have 6 years within which to file the suit and in the latter 3 years from the date of his assent.

Per *Bakewell, J*:—The demise under the melcharth was not intended to take effect until the 1st defendant recovered possession of the mortgaged properties from the 2nd and the assignment of the benefit of the melcharth was in breach of its terms and passed nothing to the 2nd defendant and as against him plaintiff had therefore no remedy under the melcharth.

Even if the melcharth is held to come into operation immediately upon the determination of the term granted by the kanom to the 2nd defendant, the 1st

1. (1911) I. L. R. 34 A. 63. (P. C.)

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defendant's obligation to pay a sum of money determined by the arrears of rent due under the kanom formed part of the consideration for the grant of the melcharth and was not rent due under it and the agreement to pay it does not run with the land so as to be binding upon the assignee, the 2nd defendant.

Plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagees in possession and the mortgagor; the arrears of rent are not a charge on the mortgage moneys and cannot be said to be money had and received by the 2nd defendant for the use of plaintiff within the meaning of Art. 62 of the Limitation Act.

Appeal under Clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Phillips, dated the 22nd December 1916 in Second Appeal No. 586 of 1915 preferred against the decree of the Court of the Temporary Subordinate Judge of Palghat at Calicut in Appeal Suit No. 851 of 1914 preferred against the decree of the Court of the District Munsif of Palghat in Original Suit No. 347 of 1913.

*K. P. M. Menon* and *K. Kuttikrishna Menon* for Appellant.

*C. Madhavan Nair, K. P. Ramakrishna Aiyar* and *P. Appu Nair* for Respondent.

The Court delivered the following

Wallis, C. J.

**Judgments**:—*The Chief Justice*:—This appeal raises a question of some difficulty. In 1904 the plaintiff, jenmi, who was entitled to redeem in 1905 a kanom granted by him to the 2nd defendant in 1893, executed a melcharth in favour of the 1st defendant by which the latter became entitled to redeem the 2nd defendant on the expiry of his kanom and to hold the lands himself on a fresh kanom. The kanom debt payable to the 2nd defendant on redemption was subject to reduction by the amount of the arrears of rent due from the 2nd defendant to the plaintiff under the kanom even though a suit for the arrears had become barred, and the 1st defendant was required on redemption to deduct this amount from the kanom debt and pay it over to the plaintiff, or in other words to collect the arrears due to the plaintiff. He did nothing till 1909 when he assigned his rights under the melcharth to the kanomdar, the 2nd defendant, stipulating at the same time that the 2nd defendant should pay the plaintiff the arrears of rent due under the kanom which he had bound himself to collect and pay on redeeming the 2nd defendant,

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One of the questions argued before us is whether the plaintiff is entitled to sue on this contract made between the 1st defendant and 2nd defendant. As regards this I agree with Abdur Rahim, J. that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das* v. *Ram Autar Pande* [1] where Lord Macnaghten delivering their Lordships' judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee. "The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay off the mortgage debt." This, in my opinion, recognises the general applicability in India of the common law rule that the parties to a contract are the proper parties to sue on it, which was also the rule in equity except in so far as equity made an exception as explained in *Gandy* v. *Gandy* [2], in cases where the contract was made for the benefit of a third party and in such circumstances as to give rise to a trust in his favour which is not the case here. In the earlier case of *Kwaja Muhammad Khan* v. *Husaini Begam* [3], their Lordships held that this common law rule was not applicable to the facts and circumstances of that case in which the agreement executed by the defendant had specifically charged immoveable property for the allowance which he had bound himself to pay to the plaintiff then a minor in contemplation of her marriage. Their Lordships observed that, although no party to the document, she was clearly entitled in equity to proceed to enforce her claim, and observed that in India, where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts. It is clear however from the later case that their Lordships did not intend to lay down that the common law rule had no appli cation to India. In *Tweddle* v. *Atkinson* [4], to which their Lordships referred, reliance had been placed on certain old cases in which persons not parties to the contract had been allowed to maintain an action in assumpsit apparently, as observed by Crompton, J. on the ground that the action of assumpsit was in its origin an action of trespass on the

1. (1911) I. L. R. 34 A. 63, (P. C.)
2. (1885) L. R. 30 Ch. D. 57-69.
3. (1910) I. L. R. 32 All. 410. (P. C.)
4. (1861) 1 B and S. 393.

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case. In *Gandy* v. *Gandy* [1], Bowen, L. J., considered that it would be mere pedantry now to go through the history of that idea; and this is probably why their Lordships in the case we are considering disposed of the case of *Tweddle* v. *Atkinson,*[2] with the remark that it was an action of assumpsit; but, as I have already said, they did not mean by this that the common law rule on the basis of which that action was dismissed was generally inapplicable in India.

This however does not appear to me to dispose of the present case. The assignment by the 1st defendant of his right under the melcharth to the 2nd defendant has been recognised by the plaintiff who by the notice Exhibit B, dated 8th January 1912 demanded payment of the arrears from the 2nd defendant by reason of the assignment and has also framed the present suit upon it; and, even if it could be said that the melcharth contained an implied covenant against assignment to the 2nd defendant, I do not think the validity of the assignment can now be questioned. I think however that by reason of this assignment the 2nd defendant became bound to redeem the old kanom and to hold the demised lands for a further term for the old kanom debt less the amount of arrears which were due at the date of redemption, and that the plaintiff jenmi when he came to know of the assignment, which was apparently shortly before he served the notice Exhibit B on the 2nd defendant, became entitled to insist on his so redeeming the old kanom and to treat the arrears as money in the 2nd defendant's hands had and received to the plaintiff's use and to recover it under Article 62 and I think he must be taken to have exercised this right when he demanded payment of the arrears from the 2nd defendant by Exhibit B on the basis of the assignment. I do not think we are bound to treat the redemption as having taken place on the date of the assignment by the 1st defendant to the 2nd defendant seeing that the arrears were not paid over to the plaintiff as they should have been. Even if we were, I should be prepared to hold that under Article 62 read with S. 18 of the Limitation Act time would not run against the plaintiff so long as he was kept in the dark as to the manner in which his rihgts had been affected by the assignment of the 1st defendant's melcharth rights to the 2nd defendant.

1. (1885) L. R. 30 Ch. D. 57. 2. (1861) 1 B. & S. 593.

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Wallis, C. J.

In this view of the case I do not think it necessary to decide the question which has been raised whether under the Malabar Law the jenmi has a charge on the amount of the kanom debt for arrears of revenue or merely a right to take credit for the amount of such arrears when the account is taken as between the mortgagor and the mortgagee.

A charge may be realised at any time under S. 100 of the Transfer of Property Act, and one test would appear to be whether under the Malabar custom barred arrears can be recovered at any time by enforcing the charge. If not I should as at present advised be disposed to hold that there cannot strictly speaking be said to be a charge. In the result, the Letters Patent Appeal will be dismissed with costs.

Bakewell, J.

*Bakewell*, J :—The plaint recites a kanom deed, dated the 6th July 1893 granted by the plaintiff to the 2nd defendant, and a melcharth, dated the 28th January 1904 to the 1st defendant, and alleges that under the provisions of the melcharth the 1st defendant was bound to redeem the 2nd defendant on the expiration of the term of the kanom in 1905 and to pay to the plaintiff the arrears of rent due by the 2nd defendant for the years 1896 to 1905. The plaint also recites an assignment of the melcharth, dated the 6th July 1909 by the 1st defendant to the 2nd defendant and an agreement therein contained that the latter would pay the arrears of rent to the plaintiff.

The cause of action is stated to have arisen on the date of the melcharth and the plaint prays for payment of the arrears of rent from 1896 to 1905 and from 1910 to 1913 and for sale of the defendants' kanom right.

The suit is therefore to enforce payment of moneys due to the plaintiff under the provisions of the melcharth. The plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagee in possession and the mortgagor. In such a suit the mortgagor is entitled to be credited with any moneys received or due by the mortgagee, including rent, as on the dates on which they were received or fell due; and I do not think that it is correct to say that these moneys are a charge on the mortgage moneys, or that the learned Judges in the case of

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Bakewell, J.

*Kanna Picharodi* v. *Kombi Achen* [1], intended to hold that any kind of charge is created by non-payment of rent. I do not think that the sum due for rent can be said to be money had and received by the mortgagee for the use of the mortgagor; he was bound to pay this sum but he never in fact received it on account of the mortgagor. At the date of the melcharth the plaintiff was therefore entitled to have an account taken of the amount due to the 2nd defendant under his kanom, in which the arrears of rent would be credited to the plaintiff, and to redeem this defendant by payment of the balance, but there was no specific sum due and payable by the defendant to the plaintiff.

It appears from the recitals of the melcharth that the plaintiff had disputes with the 2nd defendant and was anxious to redeem him and compel him to give up possession of the land, and also to obtain payment of arrears of rent, and the bargain between the plaintiff and the 1st defendant as evidenced by this document was that on the expiry of the term granted by the kanom the 1st defendant should redeem the 2nd defendant by payment of the balance due to the latter and take possession of the land, and that the 1st defendant should then pay to the plaintiff the arrears of rent which would have been credited to him in the account.

The document contains a demise of the land to the 1st defendant "for a period of 12 years commencing from the date of recovering possession of the said properties", but provides that the 1st defendant shall pay rent from 1905, when the kanom term expired, "even in case there is delay in getting possession of the properties". The last provision appears to have been inserted for the purpose of ensuring prompt performance of the 1st defendant's obligation to redeem the mortgagee.

In my opinion the demise under this document was not intended to take effect until this obligation had been fulfilled, and that since this has not been done the term of 12 years contemplated by the melcharth has not yet come into existence, and the assignment of the benefit of the document was in breach of its terms and passed nothing to the 2nd defendant.

The relations between the plaintiff and the 2nd defendant therefore fall to be determined, in acordance with the provisions of the kanom, and the plaintiff is not entitled to any remedy under the melcharth as against the 2nd defendant.

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1 (1885) I. L.R. 8 Mad. 381.

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Bakewell, J.

Assuming that on the true construction of the melcharth a leasehold interest was created in favour of the 1st defendant immediately upon the determination of the term granted by the kanom to the 2nd defendant, and that the assignment of the melcharth to the 2nd defendant, imposed upon him an obligation to take an account of the amount due under his kanom and to redeem himself, the result would be that he would hold the term granted by the melcharth as security for the balance found to be due to him. The obligation to pay a certain item taken into the account in ascertaining the balance would arise not from the redemption but from the personal liability undertaken by the 1st defendant under his melcharth.

The 1st defendant's obligation to pay a sum of money determined by the arrears of rent due under the previous demise in fact formed part of the consideration for the grant of the new lease; this sum was not rent due under the latter, and the agreement to pay it cannot be said to run with the land so as to be binding upon an assignee.

The sum agreed to be paid might possibly be a charge upon the interest (if any) of the 1st defendant in the land, as unpaid purchase money, but this point has not been taken either in the plaint or the arguments.

I respectfully agree with the learned Chief Justice that a contract cannot be enforced by a person not party to it, and I think that the provisions of the melcharth that the 1st defendant shall redeem the kanomdar and pay a certain sum to the plaintiff are personal covenants and cannot be enforced against the 2nd defendant. The same reasoning applies to the provisions of the assignment to the 2nd defendant.

The plaintiff appears to have acquiesced in the assignment of the melcharth to the 2nd defendant but it has not been shown that the latter has by conduct or otherwise agreed to be bound by its terms; on the contrary the assignment appears to have been obtained by him with the view of preventing the provisions of the melcharth from coming into force and thus postponing the redemption of his mortgage.

The Lower Appellate Court refused relief against the 1st defendant; and there is no appeal from that order by the plaintiff.

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For these reasons I think that this appeal should be allowed the decrees of the lower courts set aside and the plaintiff's suit in respect of rent for the period from 1895 to 1905 dismissed.

*Kumaraswami Sastri, J.*:—The suit out of which this appeal arises was filed by the plaintiff (the jenmi) to recover arrears of rent. The 2nd defendant obtained a kanom from the jenmi under Exhibit III on the 6th July 1893 whereby he was entitled to be in possession of the properties demised for 12 years (*i. e.*, till 6th July 1905). On the 28th January 1904 the jenmi granted a melcharth to the 1st defendant by Exhibit I, the material portion of which runs as follows:—"On the expiry of the term of the demise you shall either directly or by suit pay to Gopala Menon and another (the kanomdars under Exihibit III) the balance kanom after setting off the arrears of purapad and interest against the kanom and obtain possession of the properties. And you shall hold the properties on paying properly the purapad due from 1081 (1905—1906). You should then pay to the Edom the value of the purapad which you get set off against the kanom and obtain receipt therefor............It is stipulated that you should pay the whole of the purapad from 1081 (1905—1906) even in case there is delay in getting possession of the properties."

The 1st defendant did not redeem the kanom of the 2nd defendant when it became redeemable on the 6th July 1905 but assigned his rights under the melcharth deed Exhibit I to the kanomdar by the deed of assignment Exhibit II, dated the 6th July 1909. The material portion of the document runs as follows:—"I have this day received in cash from you Rs. 600 made up of the renewal fee of Rs. 400 due to me in accordance with the said melcharth and interest thereon and Rs. 56 being the value of paddy consisting of the michavaram paid by me to the jenmi from 1081 (1905—1906) to 1084 (1908—1909) with interest thereon and I have hereby assigned to you all the rights belonging to me under the said melcharth............You should directly pay to the jenmi the arrears of michavaram etc., payable to the jenmi from 1071 (1895—1896) to 1080 (1904—1905) inclusive. If you do not do so, you shall be liable for the damages arising therefrom."

Although the jenmi might have repudiated the melcharth owing to the melcharthdar's failure to redeem the prior kanom as expressly stipulated in the melcharth, he did not choose to do so; but on the contrary sent the notice Exhibit B to the assignee of

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the melcharth demanding arrears of rent "as he held in himself the entire rights of the prior tenant and the melcharthdar.". In his plaint the jenmi recognises both the melcharth and the assignment as valid and subsisting transactions at the date of suit and he obtained a decree against the 2nd defendant. The melcharth provides for rent being paid to the jenmi even if the melcharthdar delayed in redeeming the kanom and there is nothing so far as I can see to prevent (in the absence of any objection raised by the jenmi) the kanomdar and melcharthdar from agreeing between themselves that the kanomdar is to remain in possession so long as the rights of the jenmi to the rent reserved by the melcharth and his right to recover arrears of rent on the kanom are not affected. I do not think that the melcharth was at the date of the assignment invalid and inoperative by reason of the failure of the grantee to redeem the kanom.

The rights of the parties must be dealt with on the footing that the 2nd defendant remains liable for all the legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth.

I am of opinion that the effect of the assignment of the melcharthdar's rights to the kanomdar was to extinguish the kanom at least from the date the jenmi assented to the assignment. The kanomdar then became entitled to use the melcharth as a shield against any attempts which the jenmi might make to recover possession of the land. If the melcharthdar instead of assigning the melcharth had acted according to its terms and redeemed the kanom the jenmi would under the terms of Exhibit I have been entitled to recover the sum which would be in the melcharthdar's hands as arrears of rent which had been set off against the kanom amount. There can be little doubt that the effect of the assignment of the melkanom to the kanomdar was to allow the kanomdar to remain in possession for the period provided in the melkanom and the question is whether the kanomdar can be heard to say that he is under no obligation to pay the jenmi arrears of rent on the kanom which the kanomdar bound himself to pay the jenmi under Exhibit II. I do not think it is open to the kanomdar to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by the melcharth. In *Kulandavelu Padayachi* v. *Kamatchi Aiyar,* [1] it was held that a person who

1. (1912) M. W. N. 409

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though not a party to a contract, takes benefits under it, is bound to pay money due under the contract. The case was one where by a partition deed between two brothers, lands were given to a female member for her maintenance on condition that she paid a certain sum of money to each of the brothers. She took possession and was sued by one of the brothers for the amount payable. The lower Court dismissed the suit on the ground that she was no party to the contract but in revision Sundara Aiyar, J. held that though not a party to the contract she took a benefit under it and was subject to the burden imposed on her by the document. I might in this connection refer to *Irving* v. *Tudball* [1]. It was a case where a common vendor of various plots of land agreed to pay the purchaser of one plot, one half of the cost of erecting a party wall which was partly built on a portion of an adjacent plot and then sold the adjacent plot to another person with covenant that the second purchaser should pay to the first purchaser the sums which the vendor had agreed to pay in respect of the building of the party wall. In a suit by the first purchaser against the second, objection was taken that there was no privity of contract but a decree was passed on the ground that "sufficient had taken place to constitute privity of contract where the second purchaser in fact used the wall that had already been built upon by his neighbour and that consequently at that stage there was sufficient for the Court to hold that an action at common law as upon an implied contract would arise from such a use of the wall." Channell, J. observed that "very little will create that privity of contract where it is so convenient for all parties that the matter should be carried out between two parties really interested in it."

It has been contended on the authority of *Tweddle* v. *Atkinson* [2], that no stranger to the consideration can enforce performance of a contract though made for his benefit. That the rule laid down in *Tweddle* v. *Atkinson* [2], has exceptions and is not of universal application in India is clear from the following observations by their Lordships of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam* [3]. "First, it is contended, on the authority of *Tweddle* v. *Atkinson* [2], that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit and

1. (1902) 2 Q. B. 129. 2. (1861) 1 B. and S. 393.
3. (1910) I. L. R. 32 All. 410=20 M. L. J. 614 (P. C.)

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that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion applicable to the facts and circumstances of the present case." Their Lordships were of opinion that the fact that the payment was charged on the immoveable property and that the plaintiff was beneficially entitled to it gave her the right to sue on contract to which she was not a party.

In *Suppu Ammal* v. *Subramanyan* [1], it was held on the authority of *Rukmabai* v. *Govind* [2], and *Husaini Begam* v. *Khwaja Muhammad Khan* [3], which was confirmed by the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam* [4] that a person who is no party to a document but in whose favour a charge is created by it was entitled to file a suit to enforce its terms either as actual beneficiary or charge-holder. If the decision in *Tweddle* v. *Atkinson* [5], is to be followed, as a rule of general application it is difficult to see how the fact that a charge has been created makes any difference so far as the person not a party to the contract is concerned. In *Arumuga Goundan* v. *Chinnammal,* [6] it was held that a person could sue on an agreement to which she was no party, whereby two persons agreed to give her a certain quantity of paddy for her maintenance. Sundara Aiyar, J. referring to *Khwaja Muhammad Khan* v. *Husaini Begam* [4] observed that ' the rule that a person not a party to the contract cannot sue to enforce any rights created by it is one which would require considerable modification in this country." He thought that if the rule was subject to exceptions one very proper exception was where co-parceners agreed to provide for maintenance of female members of the family. In *Kulandavelu Padayachi* v. *Kamakshi Aiyer* [7], the same learned Judge held that a person who is not a party to a contract but who takes a benefit under it was subject to the burden imposed.

Though *Dutton* v. *Poole* [8], affirmed on error in the Exchequer Chamber T. Raym. 302, was dissented from in *Tweddle* v. *Atkinson* [5] it was followed in *Chinnaya Rau* v. *Ramayya* [9] and as pointed out by Pollock in his commentaries to the Contract Act, *Dutton* v. *Poole* [8] is having regard to ' consideration' in S. 2 cl. (d)

1. (1909) I. L. R. 33 Mad 238.
2. (1904) 6 Bom L. R. 421.
3. (1906) I. L R 29 All, 151.
4. (1910) I. L. R. 32 All. 140=20 M. L. J. 614.
5. (1861) 1 B. & S. 393.
6. (1911) 21 M. L. J. 918.
7. (1912) M. W. N. 409.
8. (1688) 2 Lev. 210, 1 Ventr. 318.
9. (1881) I. L. R. 4 Mad. 137.

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of the Contract Act good law in India, where consideration need not move from the promisee.

All that was decided in *Jamnadas* v. *Ram Autar Pande* [1] was that a purchaser of property subject to a mortgage was not personally liable to pay the sum due on the mortgage to the mortgagee so as to entitle him to a personal decree should the sale proceeds of the mortgaged property be insufficient. It was not alleged that the mortgagee was in any way prejudiced by the transfer or that any exceptional circumstances existed.

If as pointed out by their Lordships of the Privy Council in *Kwaja Muhammad Khan* v. *Husaini Begam* [2] and by Sundara Aiyar, J. in *Arumuga Goundan* v. *Chinnamal* [3] the rule in *Tweddle* v. *Atkinson* [4] is not of universal application and is subject to exceptions in India, I think the jenmi, situated as the plaintiff in the present case is, is entitled to sue on the contract between the kanomdar and melkanomdar.

Even assuming that the jenmi cannot enforce the contract evidenced by Exhibit I against the kanomdar I think that an action for money had and received would lie. This aspect of the case has been fully dealt with by the Chief Justice in his judgment which I have had the advantage of perusing and I entirely agree with his observations on the point.

Whether the claim of the jenmi is based on his right to sue on the arrangements evidenced by Exhibits I and II or on the ground that the kanom must be deemed to have been redeemed when the assignment of the melcharth to the kanomdar was assented to by the jenmi it is not barred. In the former case he would have 6 years within which to file the suit as Exhibits I and II are registered documents and in the latter he would have three years from the date of his assent. It is unnecessary to deal with the contention of the respondents that the jenmi has a charge on the kanom amount in respect of rent due to him from the kanomdar.

I am of opinion that the decision of Phillips, J. is right and would dismiss the Letters Patent Appeal with costs.

A. S. V.

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1. (1911) I. L.R. 34 All. 63.
2. (1910) I. L. R. 32 All. 410 (P. C.)
3. (1911) 21 M. L. J. 918.
4. (1861) 1 B. and S. 393.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Chidambaram Pillai and others ... *Petitioners (Accused Nos. 1 to 5.)*

v.

Muhammad Khan Sahib ... *Respondent (Complaint.)*

Chidambaram Pillai v. Muhammad Khan Sahib.

*Indian Penal Code S. 430—Mischief by wrongfully diverting water from irrigation channel—Diverted water not allowed to run to waste, but used for agricultural purposes—Water stored for being used by other persons, diversion of—Offence.*

The accused entered on the lands of the complainant and cut three bunds which had been erected in a channel that ran through the complainant's land with the result that the water in that channel ran down another channel off the complainant's land and was utilised by the accused for sale to ryots holding lands lower down. The accused was convicted of an offence under S. 430, Indian Penal Code and the conviction was upheld on appeal. It was contended for the accused in revision, that no offence had been committed by him, first because the water diverted by the accused had been used for agricultural purposes and not allowed to run to waste and secondly because the complainant himself had intended not to use the water for his own fields but merely to sell the use of it to other persons though the latter might use it for agricultural purposes. *Held*, overruling both the contentions, that the conviction was legal.

There is no warrant for assuming that S. 430 of the Penal Code was intended only to penalise the waste of water and not the deprivation of a person having the right to use it.

*Aiyannagowd* v. *Emperor* [1], distinguished.

*Ramakrishna Chetty* v. *Palaniandi Kudumbar* [2], *Chengama Naidu* v. *Emperor* [3], *Emperor* v. *Sheikh Ariff* [4], Referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Palghat Division in Criminal Apppeal No. 51 of 1917 preferred against the judgment of the Court of the Stationary Second Class Magistrate of Palghat Taluq in C. C. No. 15 of 1917.

*Dr. S. Swaminathan* and *K. S. Vydyanatha Aiyar*, for the Petitioners.

*P. S. Narayanaswami Aiyar*, for the Respondent.

*C. Narasimhachari* for the Public Prosecutor, on behalf of the Crown.

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* Crl. R. C. No. 548 of 1917 (Crl. R. P. No. 429 of 1917). 24th January 1918.

1. (1882) 1 Weir 507
2. (1876) I. L. R. 1 M. 262.
3. (1911) M. W. N. 349.
4. (1908) I. L. R. 35 C. 437

Chidambaram Pillai v. Muhammad Khan Sahib.

Napier, J.

The Court made the following

**Order**:—*Napier, J.*—The accused were convicted by the Stationary Magistrate of Palghat under S. 430, Indian Penal Code and this conviction has been upheld on appeal. The facts found are that they entered on the lands of the complainant, cut 3 bunds which had been erected in a channel that runs through the complainant's land with the result that the water in that channel ran down another channel off the complainant's land and was utilised by the 1st appellant for sale to ryots holding lands lower down. Dr. Swaminathan applies to us to set aside the conviction and sentence on various grounds, the two chief grounds being that where water is in fact utilised for agricultural purposes and not allowed to run to waste, no offence under S. 430, I.P.C. is committed, the other, that even if it would have been an offence, if the complainant had intended to utilise the water for his own fields, it is not an offence if the intention was to sell the use of it to the other persons. The first ground is one of importance, for it amounts to this, that the section is only intended to penalise waste of water and not the deprivation of a person having the right to use it. The language of the section is as follows :—

"Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property or for cleanliness or for carrying on any manufacture.........."

The section begins by saying 'whoever commits mischief," and it is therefore necessary to ascertain from S. 425 what 'mischief' is, S. 425, I. P. C. is as follows ;— " Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously" commits "mischief".

Now there cannot be any doubt that the removal of a bund is such a change in the situation of property as destroys its utility in a case where that bund has been erected for the purpose of holding up water, and that a person who so removes a bund must know that he is likely to cause wrongful loss to any person who is entitled to the use of that water. It has been found by a

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Civil Court that the complainant in this case is entitled to the use of the whole of the water in the channel in question, and that finding has been accepted by both the Magistrates. *Prima facie* therefore on the facts, an offence of mischief is made out: but it is argued that there being no waste there is no mischief under S. 430. I see no reason why the legislature should be supposed to have wished to import this limitation. Further the language of the section is against it. The water referred to is not only for irrigation but is for other useful purposes and I think that these clearly have reference to the actual utilisation of the particular water by particular persons and animals who are deprived of it by the mischief complained of. Such supply for drinking and cleanliness is a common system in the Presidency. Again with regard to 'any manufacture' it is impossible to argue that it means that a court should have to find that no part of the water was used for any manufactory anywhere. Obviously it must mean the particular manufactory which was deprived of the water.

Turning to decisions, Dr. Swaminathan was able to adduce one case which he claimed to be in support of his contention Crl. R. C. No. 134 of 1881 reported in 1 Weir 507. The passage in the judgment relied on is to this effect: 'The act of the accused in diverting water to their own fields did not diminish or tend to diminish the usefulness of the water. It merely diverted it to the use of the defendant's fields instead of to that of the complainant.' Taken apart from the facts of the case, this language seems to lend some support to the learned counsel's contention. But the facts in that case where the channel was a Government channel and was not shown to be appropriated to the use of the complainant to the exclusion of the defendants through whose fields it passed. There was no evidence that any loss had been sustained by the complainant and as the sole right of the complainant was to have his accustomed supply from Government, it followed that the act of the accused in taking water, whether they had a right to do so against Government or not, did not cause wrongful loss to the complainant, and as it was utilised by the accused, did not cause wrongful loss to the public. This case therefore is no authority for the proposition contended for.

The leading case in our Court on S. 430 is *Ramakrishna Chetty* v. *Palaniyandi Kudumbar* [1]. That was a decision of the

1. (1876) I. L. R. 1 M. 262.

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Full Court, which laid down as follows :—'It is not part of the definition of the offence that the act of the accused should be in common language a mere wanton act of waste. Under S. 430, I.P.C. the physical requisites of the act are the doing of the act which causes or is likely to cause a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right'. This case clearly establishes two propositions that the taking of water, which can only mean taking without any sort of right, is within the section and that such taking evidences the intention to cause wrongful loss. This decision was applied in a case *Chengama Naidu* v. *Emperor* [1], where the Court held that the petitioners in taking water in violation of the order as to turns issued by the Tahsildar so as to cause a diminution of supply to other ryots, were guilty of an offence under S. 430, I. P. C. The same view was taken by the High Court of Calcutta in *Emperor* v. *Sheik Arif.* [2]. The accused in that case cut the embankment of a water channel in order to irrigate their own fields and thereby deprived the complainant who owned a factory of the use of the water. One of the learned Judges held that an offence under S. 430, I. P. C. had clearly been committed; the other learned Judge had some doubts whether, in view of the claim of right, the matter should have been disposed of in the Criminal Court. He did not however dissent from the conviction under S. 430, I. P. C. Neither of the learned Judges had any doubt that, in the absence of a *bona fide* claim of right, the facts would constitute an offence under S. 430, I.P.C. The learned Counsel's contention therefore fails on this point.

The next point urged is that the water was not being supplied for agricultural purposes. I asked the learned Counsel if he would contend that water taken down a channel and stored in a tank was not supplied for agricultural purposes and he was not prepared to go to this length. The evidence of the complainant shows that he put up the bunds to store water for irrigating his own lands and for selling it to other land owners. This point therefore fails on the facts. But, even if the water had been stored for sale to other land owners, I fail to see how it was not being supplied for agricultural purposes if those landowners used it for such purposes.

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1. (1911) 2 M. W. N. 349.

2. (1908) I. L. R. 35 C. 437.

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The petition fails on the point of law, but I think that the sentences are too severe. The fines will be reduced to one of Rs. 50 on 1st accused, Rs. 100 on second accused and Rs. 5 each on accused 3, 4, and 5 who are coolies.

*Abdur Rahim, J*:—I agree.

A. V. V.

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## THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE BAKEWELL.

L. Abdul Sukur Saheb ... *Plaintiff* *

*v.*

The Secretary of State for India in Council ... *Defendant.*

Abdul Sukur Saheb v. The Secretary of State for India.

*Indian Income Tax Act (II of 1886), S. 31 (3)—Indian Income-tax (Amendment, Act (V of 1916), S. 4—Effect of, on agreement for composition of income-tax.*

The effect of the new Sub-Sec. 3 of S. 31 of the Income-tax Act is to put an end to any subsisting agreement for composition of the income-tax on the first of April 1916 when the enhanced rates of assessment came into force and to any future agreement, when any further change of the rate of tax is made. The operation of Sub-Sec. 3 is, however limited to sums which have not become payable and the agreement still subsists as to sums which have become payable but have not been actually paid at the date of the change of rate.

Civil Suit No. 325 of 1917 in the Ordinary original Civil Jurisdiction of the High Court.

The plaintiff was a merchant, carrying on business in Madras and the defendant was the Secretary of State for India in Council represented by the Collector of Madras and Commissioner of Income-tax. On 10-10-1914 an agreement for composition of the Income-tax payable by the plaintiff was entered into between the plaintiff and the defendant for a period of 5 years commencing from the 1st of April 1914, the tax for each year being fixed at Rs. 989-9-4. The plaintiff paid the tax at the rate agreed upon during the years 1914-1915 and 1915-1916. Owing to the increase in the rates of assessment by virtue of the new

* C. S. No. 325 of 1917. 10th January, 1918.

Sub-S. 3 to S. 31 of the Income-tax Act added by S. 4 of the Income Tax (Amendment) Act, 1916, the aforesaid sum of Rs. 989-9-4 was increased to Rs. 2,375 for the year 1916-1917 which was accordingly paid by the plaintiff. On 22-5-1917 the defendant wrote a letter to the plaintiff purporting to put an end to the agreement for composition, relying on the Sub-Sec. 3 to S. 31 of the Income-tax Act and called a fresh return from the plaintiff with a view to re-assess the income. The plaintiff thereupon instituted a suit against the defendant praying, *inter-alia* (1) for a declaration that the agreement for composition of income-tax dated 10-10-1914 come to between the parties was binding on the defendant for the remaining period therein mentioned: and (2) for an injunction restraining the defendant from calling for a fresh return and imposing a fresh assessment on the plaintiff. The defendant contended, *inter alia,* "that by virtue of the new sub-Sec. 3 of S. 31 of the Income-tax Act added by S. 4 of the Income-tax (Amendment) Act, the agreement dated 10-10-1914 and referred to in the plaint was determined as on and after the first April 1916 new and enhanced rates of assessment came into force; * * * that the effect of Sub-S. 3 was not to modify the tax, but to put an end entirely to the agreement referred to in the plaint as and after the 1st April 1916, when new rates of assessment came into force."

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On this plea of the defendant the 5th issue in the case was framed and tried as a preliminary issue.

*L. A. Govindaraghava Iyer* and *P. Thirumalachari* for plaintiff.

*The Hon. The Advocate General* instructed by *The Government Solicitor* for the defendant.

The Court delivered the following

Bakewell, J.

**Judgment**:—The question in this case is what is the true construction of Sub-S. 3 of S. 31 of the Income-tax Act of 1886 which was added to that section by Act V of 1916. The plaintiff entered into an agreement for a composition of the tax payable by him prior to the amendment of the section and maintains that the agreement is still subsisting, at least to some extent, and that he is not liable to a re-assessment of his income.

It has been argued that the amount of tax entered in the agreement was determined with regard to the vicissitudes of

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plaintiff's trade, which might yield less profits in one year than in another and that hardship is caused by exacting the tax for only a portion of the term fixed by the agreement, which itself provides for a change of rate of tax, and that it must have been intended by the legislature only to alter the rate of tax and not to disturb the basis of the agreement, or in other words, not to require a re-assessment of income. As pointed out by the learned Advocate-General the change made by the Act of 1916 is not only of the rate of tax but the new schedules prescribe new scales of taxation, so that the effect of the construction contended for would be to render the new scales inapplicable. The sub-section provides that "any agreement......shall be determined......by any change.........in the rates at which the tax is assessable" and the ordinary legal meaning of the word "determined" is, "put an end to." If the argument of the learned vakil for the plaintiff were adopted the word "determined" must be read as "modified" varied, or "limited", and I do not think that any reason has been shown for adopting such a construction,

The object of the agreement of compromise is to avoid re-assessment in each year of the term mentioned in it and the tax is thus fixed for future years as well as the year in which the agreement is made and the agreement ascertains the tax payable in each year and fixes the date of payment, The tax therefore "becomes due" under the agreement on a certain date.

The Act of 1916 came into force on the 1st of April 1916 and the effect of the sub-section is that a subsisting agreement is put an end to on that date, and any future agreement is put an end to when any further change of the date of tax is made; but the words "as regards any tax not already due thereunder" i. e. under the agreement, limit the operation of the section to sums which have not become actually payable, so that the agreement still subsists as to sums which have become payable, but have not been actually paid at the date of the change of rate.

By this construction all the words of the section are given full effect, and the fact that hardship may be caused to the plaintiff is no reason for adopting a forced construction. I answer the 5th issue in the affirmative. On this ruling it is unnecessary to consider the other issues in the case. The suit must be dismissed with costs.

By agreement of the parties suits Nos. 326, 334 and 338 of 1917 are decided in accordance with this judgment and they are also dismissed with costs.

A. V. V.

Abdul Sukur Saheb v. The Secretary of State for India.

Bakewell, J.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Chelimi Chetti and others ... *Appellants* * *(Respondents)*

*v.*

Subbanna. ... *Respondent (Petitioner.)*

Chelimi Chetti v. Subbanna

*Hindu Law—Partition—Filing of plaint for partition by next friend on behalf of minor co-parcener—Whether effects severance in status—Death of minor after filing of plaint but before written statement is filed—Effect of—Whether cause of action survives to mother as the legal representative of the minor.*

Where a suit was instituted on behalf of a minor co-parcener for partition of the joint family property, and the minor died after the filing of the plaint but before the filing of the written statement, and the mother of the minor plaintiff applied for permission to be brought on the record as his legal representative and to continue the suit.

*Held*, that the filing of the plaint did not effect a severance of the joint status of the family and the mother was not entitled to continue the suit.

The option vested in each individual member of a Hindu family to effect a severance of status cannot be exercised by another acting as next friend on his behalf.

Second appeal against the decree dated the 31st March 1916 of the District Court of North Arcot in Mis. App. No. 18 of 1915 preferred against the order of the Court of the Subordinate Judge of North Arcot in Civil Miscellaneous Petition No. 67 of 1905 in O. S. No. 57 of 1914.

*A. Krishnaswami Aiyar* for Appellants.

*T. Narasimha Aiyangar* for Respondents.

The Court delivered the following

**Judgment**:—This matter arises in connection with a suit instituted on behalf of a minor member of a Hindu family for

* S. A. No. 1548 of 1917 and C. R. P. No. 1322 of 1916. 29th August 1917.

Chelimi Chetti v. Subbanna.

Napier, J.

partition. The minor plaintiff died after the institution of suit but before the written statement was filed. The respondent before us, who is the mother of the plaintiff applied to the first court to be brought on record and for permission to continue the suit as legal representative of the deceased plaintiff. That court held that no cause of action survived and refused the application of the respondent. On appeal however the District Judge set aside the order of the first court holding that the respondent was entitled to continue the suit as legal representative of the plaintiff. The contention before us on behalf of the defendants in the suit is that when the minor died whatever rights he had in the family property survived to the other members of the family as there was no partition. A rather interesting question was discussed before us as to whether an appeal lay to the District Judge from the order of the Court of the first instance but the learned Vakil for the respondent did not mean to persist in the objection as to whether the proper remedy of the defendants in this court was by way of second appeal or by way of moving us in revision. We need not therefore decide any such question.

On the merits the question that requires our decision is whether by the filing of the plaint severance was effected of the joint status of the family. This is an important point, but there is no authority expressly dealing with it. It is now settled law especially after the recent Privy Council decision in *Girja Bai* v. *Sadasiva Dhondiraj* [1] and the full Bench decision of this Court in *Sundararajan* v. *Arunachallam Chetty* [2], that it is open to a member of a joint Hindu family to effect a division of his status by a clear and unequivocal expression of his intention without the necessity of any concurrence on the part of the other co-parcener. The last case laid down that the filing of the plaint in a suit for partition is such an unambiguous and unequivocal manifestation of intention within the meaning of the ruling of the Privy Council. It is curious as has been pointed to us by the learned vakil for the respondent that in the Full Bench case the plaintiff who instituted the suit was a minor. Apparently however no question such as has been raised before us was raised before the Full Bench for decision. There can be no doubt that what the Privy Council decided and what the courts have followed is that it depends upon the discretion of a member of a joint Hindu family whether he is to continue the

1. (1916) I. L. R. 43 C. 1031. 2. (1915) I. L. R. 39 M. 159.

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joint status or whether there should be a separation. That *prima facie* implies that the member who exercises such discretion must be of an age capable of exercising discretion in law. That will not be the case with a minor at least if he is of an age when discretion cannot be imputed to him. In the case of a suit instituted on behalf of a minor member of a Hindu family for partition, it has been laid down that it depends upon the discretion of the court whether to make a decree for partition or not, that is say, the court has to consider in such cases whether a decree for partition, would be for the benefit of the minor. If it is satisfied that it is not for the benefit of the minor to give a decree for partition, the court will dismiss the suit. This is laid down by the Privy Council in *Bachoo* v. *Mankore Bai* [1] approving the decision of the Bombay High Court on this point. This has also been the law in this Presidency as stated in *Kamakshi Ammal v. Chidambaram Reddi* [2], and that position has not been contested before us. If it is left to the discretion of the Court to say in a suit instituted on behalf of a minor whether there should be a division of the family or not, it seems to us *prima facie* to follow that the matter does not depend on the choice or option of any person who chooses to act on behalf of the minor member of a Hindu family. Any person is at liberty to institute a suit on behalf of a minor as the next friend, and it is forcibly urged upon us by Mr. A. Krishnaswami Aiyar that it would lead to a great hardship and inconvenience if it were left to the discretion of any person who chooses to file a suit on behalf of a minor to decide whether the family of which the minor is a member shall continue joint or become separate. The institution of a suit so far as it expresses the intention of a member of the family to divide, depends on principle on the same basis as any other expression of intention of a competent member of the family. If we are to hold that the filing of a plaint on behalf of a minor *ipso facto* constitutes a severance of the family status, then logically one would be driven to hold also that a notice given by such a person on behalf of the minor to the other members of the family of the intention to divide would also effect a severance of the joint status. This seems to us to be a position which we would not like to uphold without authority and no authority has been cited to us in support of it. It was strongly argued by the learned pleader for the respondent that as the plaint states facts

1. (1907) I. L. R. 31 B 373. 2. (1866) 3 M.H. C. R. 94.

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and circumstances which if proved would be good justification for the court decreeing partition, therefore at this stage we must proceed on the basis that there was a good cause of action and there was thus a severance of status effected by the institution of the suit. This clearly does not amount to anything more than this, that it is open to a person who chooses to act on behalf of a minor member of a Hindu family to exercise the discretion on his behalf to effect a severance. What causes the severance of a joint Hindu family is not the existence of certain facts which would justify any member to ask for partition, but it is the exercise of the option which law lodges in a member of the joint family to say whether he shall continue to remain joint or whether he shall ask for a division. In the case of an adult, he has not got to give any reasons why he asks for partition, but he has simply to say that he wants partition, and the court is bound to give him a decision. In the case of a minor the law gives the court the power to say whether there should be a division or not and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor. It is urged that there might be cases in which it would be desirable, that partition should be effected in the best interests of the minor and as soon as possible. In such cases those who are interested on behalf of the minor are entitled to institute a suit, but having regard to the decision in *Bachoo* v. *Mankore Bai* [1] and *Kamakshi Amma* v. *Chidambara Reddi* [2] it must be left to the court to decide whether there should be a partition or not.

We treat this Civil Revision Petition as a second appeal and set aside the order of the District Judge with costs here and in the court below. The respondent's petition will stand dismissed. The decree will not be drawn up until the learned pleader for the appellant pays court-fee within a week.

N. V.

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1. (1907) I L. R. 31 B. 373
2. (1866) 3 M. H. C. R. 94.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Kumaraswami Chetty ... *Petitioner** (*Complainant.*)

*v.*

Kuppusami Chetti and others ... *Respondents* (*Accused.*)

Kumaraswami Chetti v. Kuppusami Chetti.

*Criminal Procedure Code, S. 345—Compounding offences—Composition out of Court—Complainant resiling from agreement before hearing, effect of—Composition before complaint is laid or proceedings taken in court, if valid.*

The composition referred to in S. 345 of the Criminal Procedure Code is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the case comes on for hearing before the Court. Once there has been a composition of an offence compoundable under the Criminal Procedure Code, the matter is at an end and the person injured cannot afterwards effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under S. 345.

*Kanni Rowther* v. *Inayathalla Sahib* [1], followed.

A lawful composition of a compoundable offence can be made even before a complaint is laid or proceedings are taken, in court, by or at the instance of the injured person. As regards offences which can be compounded only with the permission of the Court, the operation of the composition is suspended until the court sanctions it.

*Keir* v. *Leeman* [2], *The Queen* v. *Burgess* [3], Referred to.

Petition under S. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the court of the Sub-Divisional 1st class Magistrate of Usilampatti in Crl. Appeal No. 66 of 1917 preferred against the judgment of the court of the Stationary second class Magistrate of Periyakulam in C. C. No. 306 of 1917.

*E. L. Thornton,* for the Petitioner.

*K. N. Aiya, K. Sankarasubba Aiyar* and *A. Narayanaswami Aiyar* for the Accused.

*The Public Prosecutor* for the Crown,

The Court made the following

Abdur Rahim, J.

**Order**:—*Abdur Rahim, J.*—This is an application to revise an order of acquittal passed by the Sub-Divisional Magistrate in appeal in a case in which the accused were convicted by a Second Class Magistrate of offences under sections 147, 355 and 323 of the Indian Penal Code. The Appellate Magistrate found that the charge of rioting could not be sustained upon the

* Crl. R. C. No. 613 of 1917. 22nd January 1918.
(Crl. R. P. No. 482 of 1917).

1. (1915) I. L. R 39 M. 946. 2. (1844) 6 Q. B. 308,
3. (1885) 16 Q. B. D. 141.

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evidence and thereupon acquitted the accused of that offence. That acquittal, must in my opinion, stand as no sufficient reason has been made out for interference with that part of the order of the appellate Magistrate. He has acquitted the accused of charges under Ss. 323 and 355 on the ground that there had been a valid composition of those offences within the meaning of S. 345 Criminal Procedure Code before the complainant laid the charge in court. There are two questions of law which arise in connection with this matter. First of all, a doubt has been expressed by Oldfield, J., who admitted this application, with regard to a decision of mine in *Kanni Rowther* v. *Inayathalla Sahib*, [1] in which it was laid down that it was not necessary for S. 345, Criminal Procedure Code to operate, that the complainant, after composition has been arrived at, should still be of the same mind and join the accused in asking the court that the case should be dismissed as there has been a valid composition. Once there has been a composition of an offence compoundable under the Criminal Procedure Code, the matter is at an end and the person injured cannot afterwards effectively resile from the agreement. If he chooses to do so, it is for the court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under the provisions of S. 345. In holding this view, I followed a ruling of the Calcutta High Court in *Murray* v. *The Queen Empress* [2]. There is also another ruling of the same court, *Kusum Bewa* v. *Bechu Bewa*[3] which proceeds upon the same principle. Both the learned Public Prosecutor and the learned counsel who appeared for the petitioner urged no arguments against the decision in *Kanni Rowther* v. *Inayathalla Sahib* [1] and on giving the question my best consideration again, I do not find any sufficient reasons for taking a different view.

The next point of law that has been discussed relates to the question whether a composition which takes place before any complaint has been laid in court by the person injured is covered by the provisions of S. 345. In its first part the section says that the offences described in the table attached, may be compounded by the persons mentioned in the 3rd column of the table. Looking at the third column, we find that the persons who can compound these offences are generally speaking, the persons injured and not

1. (1915) I. L. R. 39 M. 946. 2. (1894) I. L. R. 21 C. 103.
3. (1899) 3 C. W. N. 322.

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a person who has already laid a charge in court. When the person injured has entered into a composition that composition is complete; and para. 6 of the section lays down what the effect of such a composition is. It says that "the composition of these offences under this section shall have the effect of an acquittal of the accused." It is argued that the use of the words "offence" and "accused", shows that the composition which is contemplated is one arrived at after a complaint has been laid and there is an accused person before the court. I cannot accept this argument as at all sound. An offence is complete when the acts constituting it have been committed apart from whether any complaint or charge has been laid before the court or not. The allusion to "the accused" in para. 6 of S. 345 only describes his character at the time of the trial when the question of the effect of the composition is under consideration. As regards certain classes of offences which may be compounded, the legislature provides that they may be compounded only with the permission of the court. In those cases, the operation of the composition is necessarily suspended until the court sanctions it. But in the other cases, no such permission is needed and no reason is apparent to me or has been suggested why the legislature having permitted certain classes of offences to be compounded by the parties themselves without any reference to Court should insist that that composition should be arrived at after the person alleged to have committed the offence has been brought before the Court. In the absence of clear language showing that that was the intention of the legislature, I should not be prepared to impute to it any such intention. I think it is quite clear upon the interpretation of S. 345 that the contention on behalf of the complainant on this point cannot be supported. It is unnecessary therefore to discuss the English Law on the subject to which some reference has been made at the bar. But I may point out that so far as I have been able to go into the matter, the case of *Keir* v. *Leeman* [1] supports the view which I have indicated as the one adopted in the Criminal Procedure Code rather than otherwise. This was a judgment of Lord Denman, C. J., and he, after reviewing the cases at some length, laid down the following proposition on the subject of composition of offences:— "We shall probably be safe in laying it down that the law will permit a compromise

1. (1844) 6 Q. B. 308

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of all offences, though made the subject of a criminal prosecution for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it ." The exact point we have to consider here was not before the learned Judges in that case, but the proposition seems to imply that a composition of an offence of a particular description would be not the less valid because it took place before any complaint was laid in Court. Then the exception to S. 214 of the Penal Code exempts from the provisions of S. 213 and 214 cases of compounding offences which may be lawfully compounded. If the contention submitted on behalf of the prosecution in this case were sound, the compounding of particular offences dealt with under Ss. 213 and 214, I. P. C., would be no offence if the compounding took place before the charge was laid. It seems to me that this would be an untenable proposition

On the facts however of this case, I am not satisfied that the Sub-Divisional Magistrate quite clearly realised whether there was a completed agreement or composition within the meaning of S. 345, Criminal Procedure Code. It appears that there was an arbitration and the arbitrator decided after some parley, that accused No. 1 was to pay the complainant Rs. 300. It is argued on behalf of the complainant that he did not accept this composition and had not even agreed to the arbitration. The Sub-Divisional Magistrate does not seem to have arrived at a clear conclusion on these points. A further question arises as to whether the Rs. 300 was to be actually paid before there was any completed composition within the meaning of S. 345 ; or whether the complainant was satisfied with the promise of the accused to pay that amount. The amount was not actually paid before the complaint was lodged in Court. Unless it is found that the compounding was completed before the complaint was made, any incomplete agreement would not amount to an acquittal within the meaning of the law. I may say, speaking for myself, that I should ordinarily be very reluctant to interfere in a case of this nature. But there is no finding of the appellate magistrate on the subject of the charges under Ss. 323 and 355 of the Penal ode, the acquittal of the accused on these charges being based

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merely on an alleged composition. The facts found are not enough to show that the Sub-Divisional Magistrate had in this connection quite clear before his mind's eye the elements which would be necessary for a complete and valid composition, I would therefore set aside the order acquitting the accused of the charges under Ss. 323 and 355 of the Penal Code and remit the appeal to be reheard and disposed of by the Appellate Magistrate on these charges in the light of the above observations.

Napier, J.

*Napier, J*:—I agree and wish to add only a few words. With regard to the decision in *Kanni Rowther* v. *Inayathalla Sahib* [1] which has been referred to in the admission order, I desire to say that. I am in entire accord with it. It lays down that the composition referred to in S. 345, Criminal Procedure Code is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the cases come on for further hearing before the Court. That view seems to me to be entirely warranted by the language of the section. The sole question to be ascertained is whether there was a contract, and once that has been ascertained, there is nothing on principle which would allow a party to resile from his contract and lay a charge which he had agreed for consideration not to lay. A further question has been argued whether such a composition can be made before any complaint has been made to a magistrate or any proceedings taken in Court. Considerable stress has been laid on the words " offences" and " accused" in the section, and the learned Public Prosecutor has pointed out that it may be difficult to say whether a composition was lawful or unlawful unless the facts had been considered by the Court. The difficulty will arise however in the actual offence of compounding. It is clear from the very earliest authorities that the offence of compounding a felony could be committed before any charge has been laid. With reference to compounding theft, the language of Lord Coke is quoted in *The Queen* v. *Burgess* which language is reproduced in Archbold's "Pleading and Evidence in Criminal Cases" in the section dealing with compounding offences. The offence known as *theft-bote* is committed "where the owner not only knows of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him to the intent that he may escape." It is reproduced in

1 (1915) I. L. R. 39 M. 946. 2. (1885) 16 Q. B. D. 141.

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Blackstone's Commentaries as follows: "The offence of *theft-boté* which is where the party robbed not only knows the felon but also takes his goods again or other amends upon agreement not to prosecute." This is the language of the earliest authorities and there cannot be the slightest doubt that the *offence* of illegal compounding is one that can be committed in relation to a matter which has *not* been brought before the Court. Now the connection between illegal compounding and legal compounding is very close because in the Penal Code, the exception to S. 214 "says that the provisions of Ss. 213 and 214 do not extend to any case in which the offence may lawfully be compounded." Of course, lawful compounding is that which is dealt with under S. 345, Criminal Procedure Code. So the principles which apply to the offences must necessarily apply to the exception. I am therefore satisfied that a composition made to prevent a case going into a Court is just as much a composition under S. 345 as one made after the case has come into Court. As my learned brother has pointed out, it will have no effect as a plea in bar of conviction in cases covered by clause (2) unless the court has given its sanction. But where a composition has been made out of court and at a certain stage in the proceedings, the Court gives the sanction required by clause 2, that is a good composition.

On the facts of this case, it seems to me that the Sub-Divisional Magistrate has entirely misunderstood the alleged position. He seems to have thought that because P. W. 2 representing P. W. 1 agreed to abide by the decision of the arbitrators and there was a decision of a certain sort, that amounted necessarily to a contract not to prosecute. Speaking for myself, I think that the evidence is perfectly clear on that point: but I do not wish to decide this case on a question of evidence because we are sitting in revision of an order of acquittal. What the Sub-Divisional Magistrate should have done was to examine the evidence and see whether the Punchayatdars decided that the complainant was to accept the promise of the accused to pay or whether the decision of the Punchayatdars was that if the accused did pay, no complaint should be laid. I agree with my learned brother that this is a matter to which the Sub-Divisional Magistrate must direct his attention. I agree with the order proposed.

A. V. V.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE PHILLIPS.

Emani Lakshminarasu Avadhanulu and others ... *Appellants* * (*Plaintiffs*). *1 to 3 and Defts. 2, 3, 5, 6, & 7.*)

*v.*

The Secretary of State for India in Council. ... *Respondents (1st Deft.)*

Lakshminarasu Avadhanulu *v.* Secretary of State for India.

*Riparian land—What is—Riparian owner—Right to store water lifted from natural stream in wells temporarily before carrying it on to irrigated land—Easement Act, S. 7, Cl. (b), ill. (J)—Effect—Water-cess—Levy of—Legality—Use by inamdar or Zemindar of water of natural-stream to irrigate riparian lands—Liability for water-cess—Ownership of bed of stream—Effect.*

Per *Sadasiva Iyar, J.*:—In India, riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a reasonable depth inland. A depth of more than half a furlong would, usually, be unreasonable.

Whether the bed of the stream whose water is used by an inamdar or a Zemindar to irrigate his riparian lands bordering on a natural stream belongs wholly to Government or partly to Government and partly to the Inamdar or Zemindar or wholly to the Inamdar or Zemindar, the Government has no right to levy separate water-cess for the use of such water.

*Janakiramayya v. Secretary of State* [1] followed.

A riparian owner in India has a natural right not merely to lift water from a natural stream and carry the lifted water at once to the land direct but the right to store such lifted water in wells temporarily before carrying it on to the irrigated lands.

Second appeal against the decree of the District Court of Guntur in A.S. No. 346 of 1910 preferred against the decree of the Court of the District Munsif of Ongole in O. S. No. 402 of 1908.

*Dr. Pandalai* for *T. Prakasam* for Appellants.

*The Government Pleader (V. Ramesam)* for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

**Judgments**:—*Sadasiva Aiyar, J.*:—The appellants have no doubt, argued fresh questions which were not expressly raised in the pleadings and which were probably thought of only after the decision in *Kandukuri Balasurya Prasada Row* v. *Secretary of State for India* [2], but having regard to the very difficult and novel questions raised in these water-cess cases owing to the obscurity of the Water-Cess Act, I think it better to consider and decide these questions also. On the findings of fact by

* S. A. No. 1496 of 1915 19th September 1917.

1. (1915) 29 M. L. J. 389 at 427.

2. (1917) I. L. R 40 M. 886=33 M. L. J. 144. (P. C.)

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the Lower Appellate Court, the only arguable questions in this case are: (1) whether the plaintiffs are riparian owners and whether the plaint lands are riparian lands, (2) whether baling out water from the natural stream Musi and leading it into and storing it in wells and thence irrigating the plaint lands falls within the natural rights of a riparian owner in India, and (3) whether the water of the Musi stream, if taken by the riparian owner of inam lands, is water belonging to Government within the meaning of the Cess Act for which a separate cess can be legally levied by Government.

Assuming for argument's sake that the first question is to be decided in the appellant's favour, (that is, that the appellants are riparian owners and that the lands in dispute are riparian lands); I should be inclined to answer the 2nd and 3rd questions in the appellants' favour. Cl. S. 7 (b) of the Easements Act and illustration (j) thereto recognise the right of a riparian owner to enjoy without disturbance " the natural advantages arising from the situation, of " his riparian land including his right to use and consume the water of the stream for drinking, household purposes and watering his cattle and sheep and " for irrigating " such land provided it does not thereby cause material injury to other like owners. It has, no doubt, been said that " irrigation necessarily consumes a large part of the water taken from a stream for that purpose, while milling permits practically all the water to remain in the stream." and that therefore, "the right of irrigation is less strong" than the right of milling. Having, however, regard to the customs and necessities of a tropical agricultural country like India, Indian Courts should, it seems to me, be liberal in recognising irrigational rights as natural rights of as strong a character as any other, provided of course, the lower riparian owners are not injured to an unreasonable extent and " the equality and the wide participation of the benefits " of the natural stream are not interfered with to an unreasonable extent. (See Vol. II, Farnham on Waters paras. 465 and 466). (No such question of unreasonableness in the user has been raised in this case).

As I said in *Janakiramayya's case* [1], " It is not wise to confuse ourselves by juggling with the word 'property' or the word 'owner' " when used with reference to *flowing* waters. "

1. (1915) 29 M. L. J. 389 at 427.

Lakshmi-narasu Avadhanulu v. Secretary of State for India.

Sadasiva Aiyar, J.

Having carefully considered the decision of their Lordships of the Privy Council in *Balasurya Prasada Row* v. *Secretary of State for India* [1], I have seen no reason to depart from the opinions which I gave expression to in *Janakiramayya's case* [2] on the extent and limits of the rights of the Government to levy assessment under Act II of 1905. I am further of opinion that the reasoning on which I founded those opinions applies whether the bed of the stream whose water is used by an inamdar or a zamindar to irrigate *his riparian lands bordering on a natural stream* belongs wholly to Government or partly to Government and partly to the Inamdar or Zamindar or wholly to the Inamdar or Zamindar. In any of the three alternatives, the Government has, in my opinion, no right to levy separate water cess for the use of such water. It is significant that the appeal in *Ambalavana Pandara Sannadhi's* case to the Privy Council from the judgment in *Ambalavana Pandara Sannadhi* v. *Secretary of State* [3] was decided in the appellant's favour as governed by the Urlam Judgment though in that case, the lands on only one of the banks of the natural stream belonged to the Mittadar. See foot-note at page 536 (1917) M. W. N.

Mr. Ramesam for the Government argued that while irrigation by lifting water from a natural stream and carrying the lifted water at once to the land direct may be recognised as the natural right of a riparian owner in India, the right to store such lifted water in wells temporarily before carrying it on to the irrigated lands should not be recognised as a natural right. I am unable, having regard to the conditions of the country, to recognise such prudent and temporary storage in wells as either an unreasonable or non-natural exercise of the natural right of the riparian owner.

The first question, however, remains, namely whether the plaintiffs are riparian owners and whether the plaint lands are riparian lands. It is only riparian land that is entitled to the natural rights of irrigation from the bordering natural stream. As pointed out by my learned brother in his judgment, the Musi river was, in 1903 and 1904, nearly half a mile, away from Survey No. 35 in which the plaint lands are situated. The plaintiffs tried to show by producing a sketch plan that the plaint lands are almost on the northern bank of the present bed of the stream; but the lower appellate court says that "this sketch has not been proved" and that

1. (1917) 33 M. L. J. 144. 2. (1915) 29 M. L. J 389.
3. (1917) I. L R. 34 Mad. 366.

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"it cannot therefore be acted upon". As regards what is riparian land, the opinions of judges and text writers have not been uniform. Farnham says in paragraph 463 (a):—"The first and the most important test" is the natural configuration of the country through which the stream flows, so that all land within the watershed which lies in such a manner that the drainage from it finds its way into the stream might be regarded as riparian land. But a rule which would recognise such a vast extent of territory as riparian land would be almost as destructive of the right of the riparian owner as a rule which would permit anyone who could gain access to the water to make use of it. Such a rule not only would permit the consumption of the water near its source of supply, but it would result in conflicts between land-owners as to rights of way and the construction of the necessary apparatus to make the water available. Another criterion for determining what is riparian land might be the land which is in possession of one person whose holdings actually extend so as to come in contact with the water. This test, in some cases, might be too broad, because part of the land might be out of the natural watershed of the stream and therefore be outside of the boundaries established by nature for riparian ownership. The criterion which most nearly meets the necessities of the case is the rule that all land must be regarded as riparian (a) " when it is within the natural water-shed of the stream", (b) " the title to which is in one owner " and, (c) " the boundaries of which have been established in accordance with the requirements of the conditions which will best serve the interests of individual land-owners Under ordinary circumstances, the individual acquires title *to such an amount of land only as he can reasonably care for and cultivate by his own efforts with such paid assistants as his business ability makes it profitable for him to employ*". I think that, in India riparian land must be confined to land which is on the bank of the stream and *which extends from that bank to a reasonable depth inland.* I do not wish to express a final opinion in this case as to what would be the lineal measurement of such a reasonable depth, but I am clear that a depth of more than half a furlong would, usually, be unreasonable. In this case, there is no evidence that the plaint lands are situated on the banks of the stream or connected in one block with lands situated on the bank and owned by the same owner

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or situated with even a furlong's depth from the northern bank of the stream. Mr. Pandalai argued that the case should be sent back for giving an opportunity to the plaintiffs to prove that the lands are riparian lands satisfying the tests above indicated by me. But this suit is now more than nine years old and this Court allowed to the plaintiffs ample opportunity by its order of July 1913 to raise all their contentions and adduce all their proofs. I do not think that the plaintiffs are now entitled to any futher indulgence so far as the establishment of the facts necessary to support their claim as riparian owners is concerned, though I have allowed them even at the last stage to raise these fresh contentions and put forward new arguments in support of the said contentions provided they could sustain arguments on them on the materials already on the record.

On the ground then that the plaintiffs have failed to establish that the plaint lands are riparian lands and consequently have failed to establish that they are entitled to use the water of the Musi stream for the irrigation of the plaint lands without liability to pay assessment to the Government, I agree that this second appeal should be dismissed with costs.

Phillips, J

*Phillips, J*:—This case has already been before this court on three occasions and finally on 17th February 1914 the case was remanded for fresh trial on 6 issues framed in this court, the original 2nd issue and any other issues that might be framed.

The sole question now at issue is whether Government (1st defendant) has any right to levy water tax on the plaint garden lands 8·58 acres in extent on account of water taken from the Musi river. The plaintiffs have not been able to locate the plaint lands definitely but say that they form portion of the 69 acres 28 cents confirmed to plaintiffs at the time of the Inam Settlement. The District Judge has, however, found that the plaint lands are not portion of the 69 acres of garden land, and has further observed that the finding is not important, as even if they formed part of the 69 acres, the further findings as to the source of irrigation refer to the 69 acres as well as to plaint lands. The findings are that the plaint lands form part of resurvey No. 30, that the only facilities for irrigating the lands at date of settlement were a tank and wells unconnected with the Musi river, that these sources were taken into account for purposes of enfranchisement, and that there was no agreement between

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plaintiffs and the Inam Commissioner for freedom from water tax. Inasmuch as these lands were not irrigated by the Musi river at the time of the Inam settlement, and no provision was then made for their being so watered, it is obvious that plaintiffs cannot claim the use of that river water by virtue of an implied agreement, and consequently their suit has been dismissed. This second appeal was filed on 12th July 1915, and it was not until 5th May 1917 that an additional ground of appeal was filed, upon which the case has mainly been argued. The case now put forward is that the plaint lands being situated on the banks of the Musi river, plaintiffs as riparian owners are entitled to use the river water for irrigation as of right, apart from any agreement with Government. This is an entirely new case apparently put forward on the strength of the recent judgment of the Privy Council in *The Urlam case,* but in that case the question of whether an engagement with Government could be implied arising out of the natural or prescriptive right of a riparian owner was left undecided, and the decision was based upon the engagement at the time of settlement, for their Lordships remark (at page 160) 'It is enough in their Lordship's opinion that the person relying on the proviso (that is to Act VII of 1865 S. 1) shall show an engagement between the Government and himself or his predecessors-in-title by virtue of which he is in fact entitled to water for irrigation (1) from the source from which he is actually irrigating his lands (2) to the amount of water actually used for such irrigation, and (3) without being subject to a separate charge "for such irrigation". It is thus, to my mind, quite clear that the present case cannot be decided by the judment in the *Urlam case* alone, in which the following passages also occurs "It is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation is taking water from a stream belonging to the Government within the meaning of the Cess Act, " and this "nice problem" was left undecided. It, however, appears to me that the plea now put forward by appellants need not and should not be determined at all by this court. No such plea was raised in the plaint and there is no issue on the question. No doubt an issue was framed as to whether plaintiffs are entitled to the water as of right, but that this issue did not refer to their right as riparian owners is clear from the latter part of the issue which runs and have been in enjoyment of the same

over the statutory period". There is a reference in the plaint to some of the garden lands being situated on the bank of the Musi river but it is nowhere specifically stated that the plaint lands are so situated and the statement in paragraph 1 of the 1st defendant's written statement "nor have they any right to the water of the river flowing past their land except to the extent to which their right to irrigation was recognised at the Inam settlement cannot be deemed to be an admission that the plaint lands are riparian lands. It does not appear from the Inam Settlement that the lands were on the bank of the Musi river and it is clear from the Survey plans which were prepared in 1903 and 1904 that the Musi river is nearly half a mile from the Survey No. 35 in which the plaint lands are found to be situated. If therefore plaintiffs have any right as riparian owners, they must have acquired the rights since 1904. It is in evidence that the course of the river has shifted considerably of recent years, but there is no evidence to show in which year the plaint lands became riparian lands if they ever did so. The levy of the water tax complained of was for water taken in fasli 1316 (1906-1907). If therefore plaintiffs are allowed now to raise this plea of riparian right, the case would have to be sent back to be tried upon an entirely new set of facts. As this litigation was started in 1908, I think it would be most improper to allow plaintiffs to put forward this new case which has only been discovered two years after this second appeal was filed, and nine years after the suit was instituted.

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Phillips, J.

I would therefore dismiss this second appeal with costs.

A. S. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Munugarra Satyalakshmi Naraya and another ... *Appellants* *
v. *(Plaintiffs)*
Munugarra Jagannadham and others ... *Respondents*
*(Defendants)*.

Manugarra Satyalakshmi Naraya v. Munugarra Jagannadham.

*Hindu Law—Surrender by widow nature and essentials of—Surrender to a daughter's son with consent of daughters, if valid—Alienation by guardian of minor—Suit by minor after attaining majority to recover possession—Limitation Act, Sch.* II, *Art.* 44.

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* S. A. No. 2169 of 1915. 4th September 1917.

Manugarra Satyalakshmi Naraya v. Manugarra Jagannadham.

The rule that a surrender by a Hindu widow, to be valid, must be of the whole life estate, simply means that she must reserve nothing for herself. The gift of a portion of the estate to a daughter-in consideration of her past and future protection of the widow would not invalidate the surrender.

There may be a valid surrender to a daughter's son with the consent of the daughters (the intervening life-estate holders).

A surrender is not a conveyance of any right by the widow to a reversioner but only an extinguishment of her rights so that the rights of the reversioner vest at once. The reversioner gets the estate in his own right, and not because anything is conveyed to him by the widow, her surrender being tantamount to her civil death.

*Mulugu Kotayya* v. *Mudigonda Chandra Mowli Sastri* [1] followed.

No registered instrument is necessary for a surrender by the widow; but if there be a written instrument, it must be registered

No person can sue to recover possession of properties alienated by his guardian during his minority without setting aside the alienation, and a suit to set aside alienations by the guardian is governed by Art. 44 of Sch. II of the Limitation Act.

*Rangareddi* v. *Narayanareddi* [2] and *Madugulla Latchayya* v. *Palla Mukkalinga* [3] followed.

*Quaere*, whether sales by reversioners could take effect when the reversion actually falls in on the principle embodied in S. 43 of the transfer of Property Act, having regard to the prohibition of transfers of mere expectancies by S. 6 (*a*) of the same Act.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Bezwada in A. S. No. 94 of 1910, preferred against the decree of the Court of District Munsif of Narasapur in O. S. No. 743 of 1910.

*K. V. L. Narasimham* and *K. P. Shunmugam Pillai* for Appellants.

*B. Narasimha Rao, T. Prakasam* and *G. Venkataramayya* for Respondents.

The Court delivered the following

Krishnan, J.

**Judgments**:—*Krishnan, J*:—Plaintiffs—apppellants sued to recover 9 items of property as the reversionary heirs of their maternal grandfather, one Avadhanulu, the original owner, on the death of the last life-estate holder Venkamma in September 1902. Avadhanalu died long ago leaving a widow and two daughters Buchamma, plaintiff's mother and Venkamma her sister. The widow who had the first life estate died in 1887. The properties had all been alienated after the death of the widow and during the lifetime of the daughters by the first defendant, the father of the plaintiffs, who acted as their guardian in doing so. Plaintiffs claimed that as these alienations were made before the prop erties

1. (1916) 31 M. L. J. 406. 2. (1905) I. L. R. 28 M. 423.
3. (1907) I. L. R. 30 M. 393.

had become theirs and were without necessity and authority, they were not binding on them.

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Krishnan, J

Defendants other than the first pleaded, that the widow had with the consent of her two daughters surrendered the whole of her estate in favour of the first plaintiff and that the alienations by the father subsequently were partly for necessary purposes and partly for the benefit of the minors and were binding on them, and that their suit was barred by limitation under Art. 44 of Sch. II of the Limitation Act. One of the alienations was a gift, and the donee pleaded that the property had already been gifted to her by Avadhanulu himself and that the deed of gift executed by the 1st defendant as guardian was only in recognition of the previous gift.

The Lower Courts found all the allegations of these defendants proved except that the subordinate Judge has not given a finding on the previous gift alleged: and they dismissed the suit.

Plaintiffs appealed to us, and contended first that the finding in favour of the surrender was not correct, because there was no surrender in fact, and if there was, it was not vaild in law. The surrender of the widow with the consent of the daughters is found as a fact by the Lower Court on the evidence in the case, and we must accept it in second appeal. Though it is true that there is no direct proof of any act of the widow from which the surrender could be inferred, there is other evidence for it and it is not possible to say that the finding is based on no legal evidence.

The validity of the surrender is attacked on two grounds, *viz.* (1) that the surrender was not of the whole estate and was not in favour of the nearest reversioner and (2) that it would only be made by a registered instrument and there was no such instrument in the present case. The conditions required for a valid surrender have been stated recently by this court on a consideration of the various authorities on this point in the case of *Mulugu Kottayya* v. *Mudigondachandra Mowli Sastri* [1]. According to that case the surrender must be of the entire interest of the female holder who surrenders, and must be to the next reversioner, but it recognises that with the consent of the intervening life-estate-holders, if any, the surrender may be to the next male reversioner. The surrender may then be looked upon as a joint surrender by the widow and the other females. In this case the finding is that the

1. (1916) 31 M. L. J. 406.

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two daughters consented to the surrender. There is no reason therefore to invalidate the surrender to the first plaintiff on the ground that his mother and her sister had a right to a life estate after the widow's death and before his reversion fell in.

In 1879 the widow had executed a deed of gift Ex. 2 (A), by which she gave two items from her husband'd estate to her daughter Venkamma to be enjoyed by her for her lifetime in consideration of her past and future protection of her mother. It was argued that as the widow had parted with a fraction of her inheritance before the surrender, the surrender not being of the whole estate was invalid. The rule that the widow should surrender the whole estate means that she should reserve nothing for herself. She should surrender all her rights at the time of the surrender, and that was done in this case. It is not necessary to consider the effect of the surrender on Ex. 2 (A); it may cease to have effect as a gift any longer. But suppose the widow had made a sale of a part of the estate for a purpose binding on the reversioners, that will not be a reason why she should not validly surrender the whole of the remaining estate. In the case of *Ram Naresh Lal* v. *Sadhu Saran Lal* [1] a portion of the estate was given to certain parties and the balance was surrendered by the widow to the next reversioners and that surrender was upheld. The surrender in the present case therefore cannot be invalidated on this ground either.

The last objection taken was that the surrender required a registered instrument to effect it, as it was a transfer of immoveable property, *viz.*, the widow's life estate, and that in the present case it was of a value of over Rs. 100. Reliance was placed for this argument on the case in *Bettireddi* v. *Bettireddi Tataya* [2]. The appellants' argument is that the surrender was in effect a sale of property under S. 54 of the Transfer of Property Act or a gift under S. 122. It seems to me that this argument ignores the nature of surrender altogether. A surrender is not a conveyance of any rights by the widow to a reversioner but only an extinguishment of her rights, so that the rights of the reversioner under the Hindu law vest at once. The position is well explained in the judgment of Srinivasa Aiyangar, J., in the case already quoted in *Mulugu* v. *Kotayya Mudvigondachandra Mouli Saitri* [3]. The reversioner gets the estate in his own

1 (1915) 28 I C 585 2. (1916) 34 I C 748
3. (1916) 31 M. L. J. 406.

Manugarra Satya-lakshmi Narayana v. Manugarra Jagan-nadham.

Krishnan, J.

right, and not because anything is conveyed to him by the widow, her surrender being tantamount to her civil death. His rights arise by the operation of the Hindu law. No rule of law is pointed out which requires a registered instrument for the extinction of the widow's rights. If there is a written instrument, it will no doubt require to be registered under S. 17 cl. 1 (b) of the Registration Act. But where there is none, the surrender does not seem to become invalid thereby. In the case cited in *Bettireddi* v. *Bettireddi Tataya* [1] their Lordships found that the transaction there amounted to a transfer of the widow's estate for a price paid of over Rs. 100, and obviously that required a registered instrument as for a sale. The present is not a case of that nature but one of pure surrender or extinguishment of rights.

The surrender being upheld, it follows that when the first defendant as guardian of plaintiffs purported to alienate the properties in suit, they belonged to the first plaintiff. The first defendant as the father of the plaintiffs was their proper guardian during their minority.

The plaintiffs are therefore not entitled to succeed without setting aside the alienations by him: and following the ruling of this court in *Ranga Reddi* v. *Narayana Reddi* [2] and *Madugula Latchayya* v. *Pally Mukkalinga* [3] their suit must be held to be barred under Art. 44 of the Limitation Act.

Plaintiff's suit also fails on the ground that the sales were for necessary purposes and for their benefit. This finding has not been contested before us. As regards the alienation under Ex. 4, it was found by the Munsif that it was only a recognition of the gift by Avadhanalu himself and that it was not open to plaintiffs to dispute it. It is true the Subordinate Judge has not given a finding on this point, but it is unnecessary to call for one as the suit fails on the ground of limitation as well.

A somewhat difficult question was argued before us, that even if the surrender was not established and in consequence plaintiffs had no title to the properties at the time of their alienation, nevertheless the sales would take effect when the reversion fell in and the plaintiffs got title, on the principle embodied in S. 43 of the Transfer of Property Act. There seems to

1. (1916) 34 I. C. 748 2. (1905) I. L. R. 28 M 423

3. (1907) I. L. R. 30 M. 393=17 M. L J. 220.

Manugarra Satyalakshmi Narayana v. Manugarra Jagannadham.

be considerable difficulty in applying that principle in the case by reason of the prohibition contained in S. 6 (a) of that Act against the transfers of mere expectancies, but in the view taken above it is not necessary to decide the point.

The second appeal fails and is dismissed with costs.

*Spencer, J*:—I concur.

N. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SADASIVA AIYAR.

Muna Muhammad Rowther and others (*Defendants Nos.*45, 136, 160 *to* 163 *Appellants** 166 to 169 *and* 171 *and L Rs. of* 170*th Defendant.*)

*v.*

K. R. Muthu Alagappa Chettiar Panchayat of Sri Navaneetheeswaraswami temple at Sikkil. *Respondent* (*Plaintiff.*)

Muna Muhammad Rowther v. Muthu Alagappa Chettiar.

*Landlord and Tenant—Permanency of tenure—Tanjore District—Temple holding land as ryotwari proprietor—Claim of occupancy rights by tenants—Onus of proof—Temple recognised as Ekabhogam Mirasidar—Lease by Manager—Tharam Faisal Muchilika—Execution of, by tenants describing themselves as ulavadaikani mirasidar and purakudi—Assertion of permanent tenancy—Effect of.*

The village of Sellur in the Tanjore District belonged to a temple which was registered as the ryotwari proprietor thereof paying revenue to Government. The pymash account of 1816 showed that the temple was the sole proprietor of the soil of all the lands in the village at that time and was paying revenue in the shape of paddy to Government. In the pymash register of 1829 the temple was described as the sole *Ekabhogam Mirasidar* of the village and some of the tenants of the nanjah lands were described as *ulavadaikani mirasi* tenants. During the years 1820 to 1828 the Collector of Tanjore who was then in management of the temple and its properties let the lands of the village for cultivation to the highest bidders for short terms of 1 to 3 years. The actual cultivation was done generally by *purakudis* who held under no definite term and who were entitled only to *purakudi waram* to be paid by the lessee out of the gross produce. In the year 1831 seven persons, the predecessors-in-title of the defendants, applied for and obtained a lease of the temple lands from the Collector on executing in his favour a "*Tharam Faisal Muchilika*". The executants of the *Muchilika* were variously described, some of them as *purakudis* and others as *Ulavadaikani Mirasidars* but they all agreed to pay a fixed cash revenue to the Government though the same was due directly from the lessor (the temple) and also to pay the price of the paddy grain besides the *punjah* cash rent, due to the temple as *swamibhogam*, so long as the lands were in their possession. There were also provisions for payment of additional cash revenue to Government and thunduwaram or additional swamibhogam

* A. No. 146, 248 and 433 of 1916. 29th November 1917.

to the temple, if garden crops etc, were raised or if waste lands were brought under cultivation by the tenants. It was also in evidence that the defendants and their predecessors-in-title had all along been selling and mortgaging the lands to the knowledge of the successive trustees of the temple. In 1910 the trustee of the temple brought a suit to eject the defendants after serving them with proper notices to quit.

*Held*, that, on the facts of the case, and having regard to the muchilika executed by their predecessors in-title in the year 1831, the defendants had no occupancy rights in the lands in their possession but were merely holding them under a yearly tenancy and that they were liable to be ejected.

*Chockalinga Pillai* v. *Vaithialinga Pandara Sannadhi* [1], *Thyagaraja* v. *Gyana Sammandha* [2], *Chidambaram Pillai* v. *Thiruvengadathiengar* [3]. *Mayandi Chettiar* v. *Chockkalinga Pillai* [4], *Naina Pillai Markayar* v. *Ramanathan Chettiar*, [5], Relied on.

Permanent holdings under ryotwari proprietors being unusual and exceptional, the onus of proving that a tenant holding under a ryotwari proprietor has a permanent right of occupancy in the land, is on the tenant.

*Chidambara Pillai* v. *Thiruvengadathiengar* [3], *Cheekati Zemindar* v. *Ranasooru Dhora* [6] Referred to.

Where it is proved that a tenant came into possession of land under a lease for a term. the subsequent assertion of a permanent tenancy by the tenant cannot confer such right upon him, especially when the landlord is a temple whose trustee cannot grant a permanent lease of the temple lands without committing a breach of trust.

Appeals against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Original Suit No. 4 of 1913.

Appellants in No. 230 of 1916 elected to proceed with their Appeal as against all the respondents other than the 2nd respondent, order of court, dated 1st December 1911.

*M. D. Devadoss, T. R. Venkatarama Sastri, V. Ramadoss, H. Suryanarayana and S. Subramania Iyer*, for appellants.

*Hon. T. Rangachariar, G. S. Ramachandra Iyer and A. V. Visvanatha Sastri*, for respondents.

The Court delivered the following.

Wallis, C. J.

**Judgments**: *Wallis, C. J.*:—These are appeals from the decree of the Subordinate Judge of Tanjore in a suit brought by the plaintiff as trustee of a temple to eject the defendants from the lands in their possession in the village of Sellur on the ground that the lands are the properties of the temple. The Subordinate Judge after a very careful examination of the eivdence decreed the plaintiff's suit and the defendants have appealed. The case

1. (1871) 6 M. H. C. R. 164.
2. (1887) I. L. R. 11 M. 77.
3. (1887) 7 M. L. J. 1.
4. (1904) I. L. R. 27 M 291=14 M. L. J. 200.
5. (1917) 33 M. L. J. 84
6. (1899) I. L. R. 23 M. 318.

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which is one of great importance to the parties was again very ably and elaborately argued before us for several days, and we reserved judgment. The first question for consideration is, is the village of Sellur an estate within the meaning of the Estates Land Act of 1908, as, if so, the defendants are entitled to occupancy rights under the Act and the jurisdiction of the civil courts in ejectment is taken away. This question is closely connected with the question whether the defendants are entitled to occupancy rights apart from the Act, because in conferring or recognizing occupancy right the legislature, speaking generally, has so far confined itself to cases where a presumption of occupancy right had been recognized by the courts before the passing of the Act. Curiously enough the majority of cases which came before the courts related to lands owned by temples like this or mutts in Tanjore. In all these cases the decision was against the existence of occupancy right except in *Krishnasami* v. *Varadaraja* [1] and *Chockalingam Pillai* v. *Mayandi Chettiar* [2] and the latter decision was reversed by the Privy Council in *Mayandi Chettiar* v. *Chockalingam Pillai* [3]. In the well-known *Chockalingam's case* [4], certain observations of the learned Judges questioning the decision in *Venkataramanier* v. *Ananda Chetty* [5], were thought to have gone far to negative the existence of occupancy rights in permanently settled estates, but the subsequent decisions in *Appa Rau* v. *Subbanna* [6] and *Venkatanarsimha Naidu* v. *Dandamudi Kottayya* [7] and *Cheekati Zamindar* v. *Ranasooru Dhora* [8] showed that this was not so, and recognized a presumption of occupancy right in Zamindari ryots on the ground that the Zemindars were largely in the position of assignees of land revenue, that the grants in their favour did not affect the ownership of the ryots in the soil, and that even as regards ryots admitted after the sunnads granted to the Zemindari proprietors under Regulation XXV of 1802, the presumption was that they had been admitted on the same terms as other ryots in the Zamindari, that is, with occupancy rights. On the other hand in *Cheekati Zamindar* v. *Ranasooru Dhora* [8], the latest and leading case on this subject, the

1. (1882) I.L.R. 5 Mad. 345.
2. (1896) I.L.R. 19 Mad. 485=6 M.L.J. 247.
3. (1904) I.L.R. 27 M. 291. (P.C.)
4. (1871) 6 M. H. C. R. 164.
5. (1869) 5 M. H. C. R. 120.
6. (1889) I. L. R. 13 M. 60.
7. (1897) I. L. R. 20 M. 299=7 M. L. J. 251.
8. (1899) I. L. R. 23 M. 318.

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learned Judges, Shephard and Subramania Aiyar, *JJ.*, recognized that the presumption is the other way in cases where the landlord claiming to eject is not a mere assignee of land revenue, but is himself the owner of the soil—following the decision of Sir Arthur Collins, C. J. and Muthusami Aiyar, J, in *Chidambara Pillai* v. *Thiruvengadathiengar* [1]. The learned Judges held that "the claim for an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish. Of course the appellants are entitled to the benefit of any presumption which may reasonably arise from the length of enjoyment, and other special circumstances of the case. The contention that mere length of enjoyment in the capacity of tenants or purakudies irrespective of other circumstances is *prima facie* proof of occupancy right cannot be supported." Applying the principles laid down by the courts the legislature in the Act of 1908, has conferred occupancy rights on ryots in zemindaris except as to zemindari pannai lands which the zemindar cultivates as his own and except as regards lands which have never been in the hands of cultivators or have been relinquished and come within the definition of "old waste." The only villages outside such large estates that come under the operation of the Act and come within the definition of estate are villages "of which the land revenue alone has been granted as inam to a person not owning the kudivaram thereof............or any separated part of such village." If the inamdar or assignee in whole or in part of the Government revenue on the village, owns the kudivaram, that is to say, is also a land-owner in the village, the presumption against him does not arise, the Act is not made applicable to his case, and the question whether those holding under him have occupancy rights is left to be decided by the Court, the presumption being that they have not.

Now in this case it is absolutely clear, as found by the Subordinate Judge, that, as regards this village, the temple is not a mere assignee of land revenue but the owner of lands in the village. We cannot indeed tell the date at which it was founded or became so, but we know that temples in this part of India are not at all infrequently the mirasidars or hereditary owners of the cultivable lands in the village, and there is abundant evidence that

1. (1887) 7 M. L. J. 1.

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this is so in the present case. It is sufficient to refer to the paimash register of 1829 in which the temple is described as having the *ekabogam* miras of the village, a term which is well understood as meaning the whole ownership of the mirasi right in the village as opposed to cases of *palabogam* where the ownership is divided among many. Further the parties to Exhibit E, through whom the plaintiff claims, undertake in that instrument to pay swamibogam and odavarams to the temple. These payments which are in the nature of rent and fees are payable to a mirasidar by those holding under him, and the fact that they were payable by those under whom the plaintiff claims shows that they held under the temple. The temple is then in the position of an ordinary ryot owning his holding subject to the payment of land revenue either to Government itself or, if the holding be situated in a zamindari to the zamindar as assignee of the Government demand. Now as regards such ryots whether they pay the revenue direct to Government or its assignees, the presumption in this Presidency as laid down in *Chidambara Pillai* v. *Thiruvengadathiengar* [1], and recognised in *Cheekati Zemindar* v. *Ranasooru Dhora* [2], is against the existence of any occupancy rights in those holding under them and it is for those who set up such a right to prove it. This is the general law of the Presidency and the proper starting point from which to approach the question; but there are also, as I have already said, a long series of decisions as to these temple villages in Tanjore which have to be considered. They all recognize and enforce the presumption just referred to, but the result of course depended in each case on the materials put before the Court. All these temple villages in Tanjore have certain features in common. They were all managed from 1802 by the Collector on behalf of the temple until the East India Company in deference to certain religious bodies in England began to withdraw from management in the forties of last century. They were all included in the paimash or survey of Tanjore which, in this case, took place in 1829. They were also affected by the action taken by Mr. Kindersley, Collector of Tanjore, in 1830 and the following years in substituting money payments for the system till then prevailing of paying revenue in grain. As Collector he had to collect the revenue payable by the temples, and as Manager he

1. (1887) 7 M. L. J. 1. 2. (1899) I. L. R. 23 M. 318.

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had to collect the rents payable to them. In these circumstances he took the engagements or muchilikas which are a feature of all these cases except *Krishnasami* v. *Varadaraja* [1], by which the executants undertook to pay directly to the Collector in money not only the Government revenue payable by the temple but also the swamibogam or rent and other dues payable to the temple as landowner. Much depends on the proper inference to be drawn from the executiou of these documents. In the first case which came before the High Court in 1863, *Alagaiya Thiruchittambala* v. *Saminada Pillai* [2], Scotland, C. J. and Holloway, J., stated that the question was whether ryots under the mirasidar have a title to the permanent occupancy of lands subject to the payment of mirasidar's share, and observed that such a tenure for the most part depended on long established usage and custom which had to be proved. They were of opinion, however, that the mere existence of a muchilika, such as had been executed by the six ryots describing themselves as *ulavadi kanikudi* defining the terms of the ryots' holding, was opposed to the existence of an occupancy right; and they held that the terms of the particular muchilika by which the executants agreed to surrender the lands if any one offered more were absolutely inconsistent with it. In the case in *Subupalayi Ammal* v. *Appakutti Aiyangar* [3] the muchilika seems to have been taken from a single ryot, the 1st defendant's father. The 1st defendant claimed to be a perpetual lessee under it, and the Court rejected his contention on the construction of the muchilika which is not set out. In *Chockalingam's* case, (*Chockalinga Pillai* v. *Vythiyalinga Pandara Sannady* [4]), the defendant claimed to be a permanent lessee under an izara muchilika granted to him by Mr. Kindersley in 1837, and on the construction of the document the Court held that it evidenced a letting from year to year unless the defendant alleged and proved an established custom of permanent occupancy. The defendant was not precluded, they held, by the terms of the muchilika from alleging and proving such a custom but he had not done so and it could not be presumed. No muchilika was forthcoming in *Krishnasami* v. *Varadaraja* [1]. We have next two judgments of the Court in the same appeal, one reported in *Thiagaraja* v. *Gnanasambantha* and *Subramania* v. *Gnansambantha* [5] and the other in *Thiagaraja* v. *Giyana Sam-*

1. (1882) I. L. R. 5 M. 345.
2. (1863) I. M. H. C. R. 264.
3. (1866) 3 M H. C. R. 106.
4. (1871) 6 M. H. C R. 164.
5. (1883) I L. R. 7 M. 374.

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*bhanda Pandara Sannadhi* [1] where the case was reheard. Kernan, J's, judgment is in the same terms in both cases, but there is a concurring judgment by Kindersley, J., in the first case and by Brandt, J. in the second. As in Chockalingam's case an inference against the existence of occupancy right was raised from the existence of the muchilika. Both these decisions were approved of by the Privy Council in *Mayandi Chettiar* v. *Chockalingam Pillai* [2]. In *Chidambara Pillai* v. *Thiruvengadathiengar* [3] there were a series of muchilikas beginning in 1841 in which the executants bound themselves to cultivate for fixed periods and then restore the lands. The muchilikas also contained other indications opposed to the existence of occupancy right. The learned Judges came to the conclusion that the five persons styling themselves purakudis who executed the first muchilika were not improbably cultivating purakudis, "that they were expected to cultivate together with other purakudis in the village, that they were selected as executants of the lease probably because they were the leading men or chief purakudis in the village for the time being, and that the distribution of the cultivable area among themselves for purposes of cultivation was left to be adjusted by them at each lease or other interval of time". I think that this is probably true of most of the other muchilikas produced in these cases. We have next the case in *Chockalingam Pillai* v. *Mayandi Chettiar* [4] which was overruled by the Privy Council in *Mayandi Chettiar* v. *Chockalingam Pillai* [2]. In that case the High Court reversed the judgments of the two lower Courts in Second Appeal. The defendants in support of their claim produced two leases granted in 1813 which entitled the grantees to hold the lands permanently for all time to come by right of "ulavadi kani," and in the muchilikas subsequently executed by the defendants who claim under these leases they were described as ulavadai mirasidars. The Judicial Committee in their reversing judgment appear to have been of opinion that the leases of 1813 were of questionable validity and could not be relied on. On the other hand, they laid great stress on the fact that the dharkast or application pursuant to which the muchilika was taken by the Collector described the two applicants as purakudis of the assessed lands in the village owned by the temple, and on the facts that in it they undertook to pay the revenue for one year and asked that a dharkast izara for one year might be granted in their names. The inferences to be drawn from these facts were

1. (1887) I. L. R. 11 M. 77.
2. (1904) I. L. R. 27 M. 291.
3. (1887) 7 M. L. J. 1.
4. (1896) I. L. R. 19 M. 485.

not counterbalanced in their Lordships' opinion by the fact that in the muchilika the two executants were styled ulavadai miras. On the materials before them and with reference to the observations of the Subordinate Judge, their Lordships treated the words ulavadai miras as of doubtful signification. Having regard to the further investigation which these tenures have received especially in the judgment of Spencer, J., in *Chinnan* v. *Kondam Naidu* [1], and in the Chingleput Mirasi case, *Seshala Chetty* v. *Chinnasami*, [2]. I have no doubt the word miras in this part of India implies some sort of hereditary right. All that their Lordships said about it came to this, that on the materials before them it was of doubtful signification, and that therefore the decision could not be rested on it. After referring with approval to the decisions in *Chockalingam Pillai* v. *Vythiyalinga Pandara Sannady* [3] and *Thiagaraja* v. *Giyana Sambanda Pandara Sannadhi* [4] and distinguishing *Krishnasami* v. *Varadaraja*, their Lordships finally observed that the question must be decided on the contract sanctioned by the Collector, that is to say the muchilika. In the next ease, *Mahomd Meera Lavvai Marakayar* v. *Ramalingam Pillai* [6], which came before Munro and Sankaran Nair, JJ., the learned Judges held it sufficient to say that appellants had not proved that they had permanent occupancy rights in the village and that it was not necessary to say that none of the tenants had it. As regards that particular village the question was again most elaborately considered by my learned brother sitting with Napier, J. in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* [7], and the same conclusion was come to.

The result is that in all these Tanjore temple villages which have come before the Court except one, occupancy right have been held not to exist, and in that case no muchilika taken by the Collector after 1830 was put in evidence. The onus is therefore very strong on the defendants to make out their case. The evidence has been so very fully analysed by the Subordinate Judge and now by my learned brother that it is unnecessary for me to say more than that I agree generally with their conclusions.

[Then His Lordship discusses the evidence in the case.]

1. (1915) 26 M. L. J. 169, 177.
2. (1916) I. L. R. 40 M. 410=32 M. L. J. Supp. 1.
3. (1871) 6 M. H. C. R. 164.
4. (1887) I. L. R. 11 M. 77.
5. (1882) I. L. R. 5 M. 345.
6. (1911) 1 M. W. N 84.
7 (1917) 33 M. L J. 84.

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On the whole I do not think there is sufficient evidence in the present case to rebut the inference against occupancy right which according to so many decisions arises from the execution of the muchilika, Exhibit E, by the persons through whom the present defendants admittedly claim. If the defendants' predecessors had not occupancy rights in 1831, I do not think they can have acquired them since by reason of the fact that the trustees have raised no objection of late years to the transfer of the holdings by sale and mortgage. In *Mayandi Chettiar* v. *Chockalingam Pillai* [1], the Judicial Committee question the right of temple trustees to confer permanent rights of occupancy by express grant, and I think they can still less be held to have done so by implication. It is of course very unfortunate that the temple authorities should have thought it necessary to enforce the claims of the temple by seeking to eject all the tenants in the village but this is not a matter which can affect our decision.

I agree with the orders proposed by my learned brother as regards all these cases.

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*Sadasiva Aiyar, J.*:—These three appeals have arisen out of the same suit, Original Suit No. 4 of 1913 on the file of the Temporary Subordinate Judge's Court of Tanjore. The appellants are the important defendants in the suit. In Appeal No. 228 of 1916 which is the principal of the three appeals, the 43rd defendant is the 1st appellant. There are four other appellants in that appeal, namely, defendants Nos. 44, 137, 138 and 139 in the suit, but their only ground of appeal, is that they should have been exonerated from all liability to the plaintiff as from the beginning they repudiated all interest in or possession of any of the properties in dispute. The plaintiff who brought the suit in April 1910 in the Negapatam Sub-Court (from which Court it was transferred to the Temporary Subordinate Judge's Court of Tanjore) is the trustee of the famous and ancient Sri Navaneetha Iswaraswami temple situated in the vlllage of Sikkil near Negapatam. The temple owns lands in several villages. This suit was brought for recovery of lands, house sites and houses situated in the village of Sellur, the defendants being alleged to be tenants from year to year who refused to vacate their holdings after proper notices to quit had been given.

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1. (1904) I. L. R. 27 M. 291.

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157 defendants were impleaded at first and with the legal representatives of defendants who died during the pendency of the suit, the last number of the defendants became 176.

The most important question in this suit is whether the tenants have got occupancy rights in the cultivable lands in the village in their respective holdings. The other minor questions need not be referred to at present as a detailing of them will unnecessarily distract the attention from the main issue and the conclusions in respect of several of them depend upon the decision on the main issue.

The principal question is covered by the first three issues framed in the suit which are as follows:

"1. Is the plaint temple the absolute proprietor of the entire village of Sellur?"

"2. Are the defendants tenants from year to year and is the plaintiff entitled to eject them?"

"3. Are all or any of the defendants entitled to a right of permanent occupancy by prescription or otherwise?"

The temple's right to and in the whole village of Sellur had its origin in such remote times that no grant or title-deed is forthcoming. The earliest document Exhibit ZZ in March of the year 1806 contains accounts showing that the temple harvested the produce of the lands in the village, allowed the temporary cultivators (called purakudis) the waram due for their labour at varying rates for the lands in the southern half and in the northern half of the village and retained the balance. (The word 'kudivaram' means strictly the share given to or retained by the actual cultivator or 'kudi'. The right of permanent occupancy, if it belongs to the 'kudi' is sometimes known in the Zemindari and Inam tracts as '*kudivaram right*,' but the mere receipt of kudivaram by a tenant does not of course show he has the "kudivaram right" in the larger sense, that is, that he has permanent occupancy right in the lands in his holding. Sometimes the kudivaram *right* is shortly spoken of as "kudivaram" and this occasionally leads to confusion.) [His Lordship then examines the evidence in the case.]

We now come to the undisputed important paimash account of 1816 which has not been marked as one single exhibit, but portions of which have been marked in a confusing manner as Exhibits H, H1, XI and XI (a). This paimash account almost

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conclusively shows that the plaint temple was in 1816 (and had been before that) the sole proprietor of the actual soil of all the lands in the village of Sellur. The temple was paying *nelkuthagai* (paddy revenue) to the Government and the village in question was known as the nelkuthagai village belonging to Sikkil Navaneetha Iswarasawmi temple. The lands, house-sites and every bit of soil in the village are mentioned as belonging to the big temple with its two sub-temples of Kailasanathaswami and Ananthanarayana Perumal to which two sub-temples, small areas had been given by the bigger temple as sarvamaniyam. The whole area of the village is stated to be in the enjoyment of these "three individuals," that is, the three temples.

The only "mirasi" right recognised in any others is in 7 dwellings of tenants, other tenants' houses being 38 in number and occupied by purakkudis (7), kasavargam holders (service tenure) (10) and adimais (slaves or serfs) (21). Then we come to another set of undisputedly genuine documents marked Exhibits F, F1, F4, F5, F13 and F14. The earliest of them is dated 30th October 1820 and the latest is dated in January 1825. It is well known that these and other famous temples in Tanjore were managed by the Collector on behalf of Government for about half a century from about the beginning of the 19th century. The Collectors found that it was very difficult to make the cultivators (mostly fugitive) to properly cultivate the lands. So in 1820, the then Collector of Tanjore thought it best in the interest of the temples to obtain proposals from intending lessees for short periods of one to five years and to let the whole cultivable area in each temple village to that intending lessee who offers the highest rent (paddy for nanja lands and cash for punja lands), it being the successful offerer's look-out to bring cultivators upon the lands and to bring as much extent as he could under cultivation. Such leases are known as "proposal" leases. Exhibits F(1) and F(13) relate to the Izara muchilika executed by one Chockalingam Pillai taking up the lands in this plaint (Sellur) village and another temple village (Abhishekakattalai) under the Collector from 1st July 1820 to 30th June 1823, that is for three years. Exhibit F(1) clearly shows that the actual cultivators were only purakudis that is, cultivators who had no definite term of incumbency and were entitled only to purakudiwaram to be paid by the lessee out of the gross produce, that the lands themselves were let and that the mirasi or

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*occupation right* in the lands belonged to the temple, the paddy revenue due to Government being the real melvaram. The mirasidar when he cultivated through either his pannai or adimai (slave or serf) cultivators takes the whole produce minus the Government paddy revenue, paying wages to his pannaiyals and serfs. If he leases them to several purakudies or to the proposal-lessee, what he gets from the lessee may be loosely called "melvaram", the proposal-lessee taking the kudivaram. In the case of the proposal-lessee again *as between himself and the purakudis*, what he retains will be again "melvaram" and what the purakudies are given will be the "Kudivaram." But as I said, such loose language leads to confusion and in the old documents, "melvaram" is used usually for the Government paddy revenue and purakudivaram is used for the purakudi cultivators' share given to them out of harvested produce, what the temple mirasidar obtains being known as *swamibhogam* (a very important term) to which thunduvaram is attached in some cases.

The next document is Exhibit F (4). This is one of the proposals or offers made for the plaint Sellur village and the other Abhishekakattalai Village in September 1823 by one of the intending proposal-lessees. This is for only one year. This proposer's proposal seems to have been accepted also for the three succeeding Faslis 1234 to 1236, that is, July 1824 to June 1827 (See Exhibit F) because he agreed to pay 3,850 kalams of paddy rent per year instead of 3,750 kalams which prevailed in the preceding 4 years. These documents which had effect between 1820 and 1827 for 7 years clearly establish the temple's proprietory kudivaram right in the village lands and the fact that its lessees were changed even during this short period. See also Exhibit YY (1), account of the receipts and disbursements of the temple in the last year of the proposal-lease period. Then the lands were again taken up by the temple under amani system and Exhibit N, is the account of the year 1827—28. This account shows that the entire gross produce was harvested by the temple, purakudivaram being paid out of it to the actual cultivators under the temple. (* * *)

We now come to an important document of 1828—29 which is the paimash chittah of the Sellur village prepared in that year. This document again, like the paimash of 1816, has been exhibited not as one document, but as several documents, namely, H (2), WWW series (5 in number), XI (*b*), XLVIII series (10 in

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number), LXXXIV and LXXVII. This paimash account was laboriously prepared, though not by the higher grade Revenue Officers. Such an account, it is well-known, while fairly reliable as regards the numbers, extents and character of the lands as mentioned in it and as regards broad statements as to rights, is also found to contain statements based on the allegations of interested and ignorant residents of the village and such statements are of very little value especially when there has been no subsequent revision or check by an officer of one of the higher Revenue grades. (See observations in the judgment in a similar case *Naina Pillai Marakayar* v. *Ramanathan Chettiar* [1].) There are even statements of a somewhat (what I may call) absurd character found in such preliminary paimash accounts. In the present case for instance, while Exhibits H2, WWW and in fact every portion of this paimash chitta account of 1829 acknowledges the temple to be the sole ekabhogam mirasidar entitled to the full occupancy and cultivation right in the whole of the village lands, we find in Exhibit XI(*b*) (See page 438 of the printed documents papers) that 11 persons are described as ulavadai kani mirasi tenants (under the ekabhogam mirasidar) of the village nanjah lands and one of these 11 persons is stated to be the temple itself, that is, the temple is a tenant of land under itself, which is absurd. Again the very next sentence in this Exhibit XI (b) is inconsistent with any kudivaram or occupancy right in all but the temple, because it says that the custom in the village is that only purakudivaram is entered in the Devasthánam accounts as given to tenants and that, because the Government gets its revenue in paddy, there is no mirasivaram in the village. This sentence clearly means that the mirasidar temple takes the whole produce under its kudivaram or direct cultivation right and gives out of it to the purakudi tenants the share due to them for the labour of cultivation.

Guarding ourselves then from giving too much weight to the inconsistent and contradictory statements sometimes found here and there in this paimash account of 1829 (it seems not to have been checked by any higher revenue officer), the statements in this paimash account clearly indicate that the kudivaram right belonged to the temple alone as ekabhogam mirasidar.

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1. (1917) 33 M. L. J. 84. at page 96.

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Then we come to the last set of the really important documents in this case, namely, Exhibits E. F. 19, F. 20, XIII series, F2 and F3. We have seen that the proposal-leases came to an end in 1828 and that the village lands were again harvested by the temple Manager, the Collector, on the amani system. The then Collector, Mr. Kindersley, in the year 1830, desired to substitute money payments on what was known as a "permanent commutation" rate, that is, commutation as regards the value of the paddy revenue payable by the temples. ('The word permanent' in some of these documents denotes only the permanency of the commutation rate at which the paddy grain due to the Government as melvaram revenue was permanently settled. See at the end of Exhibit E, where the temple lessees consent to the following provisions. "As for the nanjah melvaram in respect of the said village, we shall pay theervai according to the price *permanently settled* at $3\frac{9}{16}$ pons per kalam. Whether the price becomes more or less than that price, the profits or loss must go to us and not to the Government.") Mr. Kindersley also dropped the original pannai, purakudi and adimai cultivation systems and the intermediate "proposal" system and let the entire cultivable lands in each temple village on what has become familiar, as the "tharam- faisal muchilika" system to one or more lessees, such lessees (where there were several) being usually the prominent, influential and representative persons among the numerous cultivators in the village. Many of these "tharam faisal muchilikas" have come in several cases before this Court. The important operative clauses in them have always been substantially the same. The applications to the Collector by the intending lessees in respect of these "tharam faisal muchilikas" have slightly differed, in language, some of the applicants describing themselves as purakudies alone, some as kudimiras, some as purakudimiras, some as ulavadai purakudimiras and some (as in this case) ulavadai kudikanimiras. Some applications mentioned only one fasli, and others mentioned indefinite periods and so on, but the muchilikas in which the applications culminated, and which were finally accepted by the Collector and were executed by the lessees, contained almost the same terms. In this plaint village of Sellur, the "tharam faisal muchilika" executed to the Collector is Exhibit E. It was executed on 6th February 1831 by seven persons, two of them Brahmins

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(including a Brahmin lady), three of them Pillais and two of some other caste. In the body of the document, the male Brahmin executant describes himself as *purakudi* Samu Iyer One other executant describes himself as ulavadai Kanimiras Arunachellam Pillai. Another executant Suppa Pillai signs at the end as *purakudi* Suppa Pillai. But all of them jointly execute Exhibit E, agreeing to be jointly liable under it in identical terms. The document begins by describing the nanjah and punjah lands which these have jointly *agreed to accept* from the temple *for the purpose of cultivation* from the current fasli. They agree to pay the melvaram theervai due to the Government (the Collector, who obtained Exhibit E. being both the Government Agent and the temple Manager) in cash instead of grain, though the said theervai was directly due by the lessor (the temple) to the Government. They further agree to pay the equivalent price of the paddy grain besides the punjah cash rent due to the temple as *swamibhogam* (soil proprietor's dues, see Wilson's Glossary). Then, they say that they will pay the rents as agreed upon *as long as the lands are in their possession*. Th .e are also provisions for paying additional revenue to Government when garden crops such as betel, tobacco, plantain, onions, garlic etc., are cultivated, besides an additional *thunduvaram* (of the same nature as swamibogam or soil proprietor's share) to the temple. Provision is again made when waste lands are cultivated newly for paying additional theervai and swamibhogam to the Government and the temple respectively. They are also to supply *kudimaramath* labour for repairs etc., besides men for carrying the temple paraphernalia in times of festivals and so on.

As I pointed out, none of the executants of the muchilika claims a higher right in any portion of th: lands than any of the other executants. I have dealt in my judgment in *Naina Pillai Marakayar* v. *Ramanathan Chettiar* [1], *the Mangal case* with the uniform interpretation which has been placed upon these "tharam faisal muchilikas" by this High Court from *Chockalinga Pillai* v. *Vythialinga Pandara Sannady* [2], namely, that the lessees who execute those muchilikas and agree to cultivate lands under them do so on a terminable tenure and cannot claim a permanent right of occupancy. It is contended that the executants could not be held to have agreed to relinquish their then existing permanent

1. (1917) 33 M. L. J. 84. 2. (1871) 6 M. H. C. R 164.

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right of occupancy by executing this muchilika, assuming that they had such a permanent right on the date of its execution. I shall shortly state three considerations which refute this argument:

Firstly, the burden of proving that on the date of this muchilika of 1831, the executants had a permanent right of occupancy lies very heavily on them and on those claiming under them. (The contesting defendants have clearly admitted in this case that they claimed only under the executants of these muchilikas). It is not contended that in *all the lands* of the village taken together the executants had a joint permanent occupancy right. That the temple was cultivating at least about one-third of the lands through pannai purakudies then is admitted, the paimash of 1829, as I said already, making the statement that as regards those lands, the temple was its own ulavadai kudikani tenant. It is also admitted that these Brahmins and Pillais (who executed Exhibit E,) and numerous other tenants cultivated distinct plots in the village separately and not jointly. The permanent occupancy right was in fact claimed only for those who are described in the paimash of 1829 as ulavadai kudikani mirasidars and not for the numerous persons described as purakudies etc. Mr. T. R. Venkatarama Sastri for the 43rd defendant even argued strenuously that the occupancy right could *not* be claimed for the lands in the *vadapathi* (northern half) portion of the village lands but only for the lands in the thenpathi (southern half) portion in the holding of his client, the two halves being separated by a common irrigation channel. That the descriptions given of themselves by these tenants are of little value has been held in almost all the cases Mere assertion by a tenant, especially where his landlord is a temple whose trustee cannot give an occupancy right without breach of trust, would not derogate from the plain rights of the temple. See *Satya Sri* v. *Kartik* [1] and *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* [2]. In *Chidambara Pillai* v. *Thiruvengadathiengar*, [3] followed in this respect even in *Cheekati Zamindar* v. *Ranasooru Dhora* [4], the presumption against the existence of occupancy rights in a tenant, holding under a person who himself owns the kudivaram proprietory right in the soil is stated to be a strong presumption. In the present case, except the vague description of some cultivating tenants in

1. (1912) 15 C. L. J. 227.
2. (1869) 13 M. I. A. 270.
3. (1887) 7 M. L. J. 1.
4. (1899) I. L. R. 23 M. 318.

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the paimash of 1829 as ulavadi kudikani mirasidars and the fact recorded in that paimash account that some lands in the posses- sion of one of these tenants were mortgaged to the temple and to another person (even assuming such statements to be true and even assuming that the mortgage was in 1811 under (Exhibit XLVI) there is no other evidence to support the conten- tion that in 1831, any cultivable lands, much less all the cultivable lands in the village, were held under permanent occupancy right, whereas the overwhelming probabilities are against the validity of that contention.

In the second place, I think, considering the influence of the old East India Company's Collectors and even of he Subordinate Revenue Officers, the executants of the muchilika Exhibit E who represented all the cultivating tenants, must be deemed to have agreed thereafter not to claim any larger. interest (assuming that they had any such plausible claims before that) when they accept- ed the lands for cultivation under the terms of Exhibit E than was expressly reserved to them thereunder. It seems difficult to hold that persons intending to claim varying rights (some superior and some inferior, the superior rights again to be attached to some only of the lands and the inferior rights to other lands) would jointly execute the same muchilika clubbing all the cultiva- ble lands together and agreeing to hold them on the same terms (with further provisions for cultivating additional lands not then held by any of them and so on) unless as decided in some of the cases on similar facts, they intended that the newly created lease- hold rights under the "tharam faisal muchilika" should supersede the vague and varying old rights, if any. The permanent right, alleged to have already existed, is again claimed not under any perpetual lease granted with reference to any specific area, but because the tenants were ulavadai kudikani mirasidars of the entire village lands. The arguments at page 9 of the case *Chidambara Pillai* v. *Thiruvengadathiengar*, [1] on this point are very instruc- tive. "Further, the provisions which the seveal leases contain with reference to the cultivation of poramboke, the protection of trees and the appropriation of trees seem to indicate that this kudikani right, if any, did not extend to other than land under actual cultivation and this is not ordinarily the case where ryots have kudikani right to the village as contradistinguished from a per-

1. (1887) 7 M, L. J. 1,

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petual lease granted with reference to a specific area. It is not the appellants' case that they or their ancestors had a perpetual lease from the temple." In *Thiagaraja* v. *Giyana Sambanda Pandara Sannadhi*, [1] Kernan, J., says at page 79 "it is contended that long possession is evidence of right of occupancy. But when the right of possession or *right to continue in possession is proved*, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *prima facie* follow the terms of the instrument in the absence of any subsequent agreement." In that case, the defendants had been in possession since, at all events, 1827 (*see* page 78), that is, before the date of the muchilika of 1830 which gave them *the right to continue in possession* under certain definite terms. The learned Judge, as I said above, held that the right to so *continue* must be governed by the terms of the "tharam faisal muchilika" and not by any prior circumstance. Even when there was a regular perpetual lease granted to a tenant in 1820, it was held by the first two Courts in the case decided in *Mayandi Chettiar* v. *Chockalingam Pillai* [2], that by applying for a fresh grant and executing a "tharam faisal muchilika" in 1832 "the tenant had either given up or had lost all his right to the perpetual lease granted to him by the temple authorities and that all he and his successors have to depend upon is the fresh contract made with the Collector in 1832 under which no permanent right of occupancy was conferred." This conclusion was approved of by their Lordships of the Privy Council.

Thirdly, the areas of the holdings after the date of this "tharam faisal muchilika" Exhibit E of 1831 do not correspond to the areas mentioned in the paimash of 1829, Exhibit XI (*b*). In Exhibit XI (*b*) for instance Appasami Appa is alleged to be the tenant of 2 velis plus 7 velis 5 mahs, total 9½ velis. But he is content to hold after the date of Exhibit E, 2 velis 2 mahs and 65 gulis (see Exhibit F 20) and is described in Exhibit F 20 as a mere *purakudi*, while in the paimash account he is one of the eleven ulavadai kudikani mirasidars. The learned Subordinate Judge has also shown how the descriptions as regards both the lands and the tenants mentioned in the paimash of 1829 are full of inconsistencies and contradictions, adopting the statement prepared by the plaintiff's vakil in the lower court from the records.

1. (1887) I. L. R. 11 M. 77. 2 (1904) I. L. R. 27 M. 291.

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(See paragraph 104 of the Subordinate Judge's judgment and the statement marked A appended to that judgment).

Another contention was that the conduct of the temple trustees in standing by when the tenants were alienating by sale and mortgage and subdividing their holdings conferred a right of permanent occupancy on the tenants by estoppel or by prescription. I have nothing to add to what I said to a similar contention in the case in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*, [1] and I must, therefore, reject the contention. As Muthusawmi Aiyar, J., said in the case in *Chidambara Pillai* v. *Thiruvengadathiengar* [2] "Seeing that the officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to purakudies as an incident of good management and the length of time for which the purakudies cultivated, inspired them with a belief that they were not liable to be ejected as long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors accompanied with an assertion of kudikani right which may loosely be used to indicate a permanent tenure of some kind or other. It may be that the trustees took no notice of what the purakudies did as they undertook (with the Collector) not to interfere with their occupation so long as they regularly paid rent." I shall, therefore, not refer in detail to the numerous documents on the defendants' side subsequent to 1831 ranging from 1838 (see Exhibit LXXXVII) to January 1910 (see Exhibit IV, dated about 3 months before suit) indicatng voluntary and involuntary alienations of the holdings and the recognition of the alienees as tenants by the temple.

In the result, I agree with the conclusions of the Subordinate Judge on the principal three issues. The Appeal No. 228 of 1916 therefore substantially fails except in two particulars, (1) the defendants Nos. 44, 137, 138 and 139 will be exonerated from the plaintiff's claim as they disclaimed all interest in the lands, and (2) the mesne profits awarded would be separately assessed against the 43rd defendant as regards the lands in his possession. In other respects, the appeal is dismissed, the 43rd defendant paying proportionate costs to the plaintiff in both courts on the value of the relief decreed against him.

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1. (1917) 33 M. L. J. 84. 2. (1887) 7 M. L. J. 1 at page 10.

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[With slight modifications which are not material to this report, the other two appeals were also dismissed.]

Lastly, there are the Memoranda of Cross Objections filed by the plaintiff as regards the house-sites and houses in the possession of the defendants. These properties are clearly not included in the "tharam faisal muchilika," Exhibit E, and the plaintiff has not shown any title to eject the defendants from the house-sites and houses. The other contentions except interest on mesne profits in the Memoranda of Cross Objections are not pressed. The Memoranda are therefore dismissed with costs except as regards interest on mesne profits which will be allowed at 6 per cent. per annum from date of plaint.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE PHILLIPS.

Appaji Iyer and others ... *Petitioners (Accused Nos. 1 to 3.)*

*In re.*

Appaji Iyer *In re.*

*Criminal Procedure Code, S. 517—Scope of—The Madras Towns Nuisances Act (III of 1889) Ss. 6 and 7—Conviction under—Sovereigns found in accused's pocket and waist-cloth—No proof that sovereigns had been staked—Confiscation of, illegal.*

The fact that money is found in the pocket or waist-cloth of a person engaged in gambling does not, by itself, lead to the inference that it has been staked. Where a magistrate convicted the accused of offences under Ss. 6 and 7 of the Madras Towns Nuisances Act and at the same time made an order for the confiscation of four sovereigns found in their pocket and waist-cloth and there was no evidence that the sovereigns had been actually staked, *held* that the order of confiscation was illegal.

Per *Ayling, J.*—S. 517 of the Code of Criminal Procedure, wide as it is, does not confer on a Court an absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional 1st class Magistrate of Gobichettipalayam in Appeal No. 26 of 1917, preferred against the judgment of the Court of the 3rd class Magistrate of Satyamangalam in Calendar case No. 84 of 1917.

*J. C. Adam, Counsel* for the petitioners.

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* Crl. R. C. No. 558 of 1917. 8th January 1918.
(Crl. R. P. No. 486 of 1917.)

Appaji Iyer *In re.*

*C. Narasimhachariar, for the Public Prosecutor on behalf* of the Crown.

The Court made the following

Ayling, J.

**Order** :—*Ayling, J.*;—I can see no reason for interfering with the conviction in this case or with the order directing the destruction of the cards. The real difficulty is in determining whether the Magistrate had jurisdiction to pass the order confiscating the money (12 sovereigns) found on the persons of accused 2 & 3.

The order admittedly cannot be brought under the last paragraph of S. 3 of Act III of 1889, inasmuch as the conviction was not under clause (10) of the same section : and it can only be upheld if it is covered by S. 517, Criminal Procedure Code Cl. 1 of which runs as follows :—

" When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence".

Mr. C. Narasimhachariar, who appeared for the Public Prosecutor has endeavoured to support it on two grounds :—

1. That the money was property " which has been used for the commission of an offence", i. e., gaming in a common gaming house (S. 7 of Act III of 1889).

2. That, even if it were not, the Court had jurisdiction to dispose of it by confiscation under the earlier part of the clause as property produced before it.

I have no doubt that the section authorises the confiscation of property " which has been used for the commission of an offence". (Vide *Ramaswami Aiyar* v. *Venkateswara Aiyar.* [1]). But are the sovereigns such property? The Sub Magistrate who passed the order merely speaks of them as property "concerned in the case". The Sub Divisional Magistrate in upholding it calls them "sovereigns used for gaming;" but he does not refer to, much less discuss, the evidence to show that they were used for gaming, or consider the difference between the sovereigns found in 3rd accused's mouth and the sovereigns found in 2nd accused's pocket. I take it the coins can only be said to have been used for gaming if they had been actually staked.

1. (1912) 24 M. L. J. 1.

Appaji Iyer In re. Ayling, J.

Now as regards the eight sovereigns found in 3rd accused's mouth, I think this can be legitimately inferred from the evidence. The place of concealment tends to indicate a guilty knowledge and prosecution witness No. 1 deposes that, when the police party entered, 7 or 8 sovereigns were lying on the mat with the cards. These disappeared somehow; and it may be fairly inferred that 3rd accused, who was one of the gamblers, snatched them up and put them in his mouth. I think the order of confiscation of the eight sovereigns found in 3rd accused's mouth can be upheld on this ground.

The other four were found, three tied in 3rd accused's waist-cloth and one in 2nd accused's pocket. There is nothing to indicate that these coins had been staked; and it cannot be inferred from the fact they were found in the pocket or cloth of a person engaged in gambling. *Emperor* v. *Walli Mussaji,* [1] and *Emperor* v. *Tota,* [2] are cases in which orders for confiscation of money in similar circumstances were set aside, because they were not covered by the terms of the Gambling Acts in force; there was apparently no suggestion in either case that any portion of S. 517, Criminal Procedure Code, could be invoked in aid of the order.

Mr. Narasimhachariar, however, seeks to fall back on the first portion of the section, and argues that the coins were produced before the Court, and that the Court is authorised to dispose of them "as it thinks fit"—which words would, he says, include even confiscation. The section was altered in 1898 and its present wording is, no doubt, startlingly wide; but I cannot believe that it was intended thereby to confer on a Court the absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence. A reference to the draft bill which ended in the Code of 1898 shows that the original intention was to empower a Court to pass such order as it thought fit for the disposal of any property produced before it "the title to which is doubtful or in dispute"—which seems to indicate a provisional disposal of such property, leaving any party claiming an interest therein to seek his remedy through the usual channels against the holder. In the Select Committee the words "the title to which is doubtful or in dispute" disappeared, an omission which is not explained in the Committee's report. If the intention had been to confer such wide punitive

1. (1902) I. L. R. 26 B. 641. 2. (1904) I. L. R. 26 A. 270.

Appaji Iyer *In re.*

Ayling, J.

powers as are now claimed (for confiscation implies nothing less) it is difficult to believe that no explanation would have been offered. We have not been referred to any case in which the section has been construed in such a wide sense. The judgment in *Russel Bibee* v. *Ahmed Musaji* [1] implies no more than the limited and provisional power above indicated. The two cases already quoted, *Emperor* v. *Walli Mussaji* [2] and *Emperor* v. *Tota* [3] are both indirectly against such a view; for in each case the order set aside could apparently have been supported in view of the law contended for on behalf of the Crown. With these may be read the order in *Ponnusami Pillai, In re* [4] which is indeed an authority to the contrary, though no doubt of an *obiter* nature and unsupported by reasons. I may also refer to the view taken by the learned Judges in *Abinash Chandra Bhattacharjee* v. *Emperor* [5], regarding the proper interpretation of the earlier portion of the section, although I am unable to follow them as regards the limitation of forfeiture of property connected with an offence.

I would set aside the order of confiscation of these four sovereigns as not warranted by S. 517, Criminal Procedure Code, and direct their return to the persons from whom they were seized.

Phillips, J.

*Phillips, J.*—The first point taken is that the finding that the house is a gaming house is based on the uncorroborated testimony of an accomplice. In the first place prosecution witness No. 2 is hardly an accomplice in the offence charged, although he may have frequented the house for gambling on previous occasions, and secondly, the evidence of prosecution witness No. 1 is corroborative in that it shows that some nine persons of different castes were gambling together. Our interference in the concurrent finding of two Courts is not called for on this ground.

The second point is that the order to confiscate the cards and sovereigns is not legal. The Sub-Magistrate does not state under what provision of law he passed the order, but inasmuch as the convictions were under Ss. 6 and 7 of Act III of 1889 the order cannot have been passed under S. 3 of that Act, and the presumption being that the Sub-Magistrate acted according to law the order must have been passed under S. 517,

1. (1906) I. L. R. 34 C. 347.
2. (1902) I. L. R. 26 B 641.
3. (1904) I. L. R. 26 A. 270.
4. (1909) 19 M. L. J. 254.
5. (1907) I. L R. 34 C. 986.

Criminal Procedure Code, the section relied on by the Sub-Divisional Magistrate. The question then is whether the order is a legal order; and the cases quoted for petitioners, i. e., *Emperor* v. *Walli Mussaji* [1] and *Emperor* v. *Tota* [2] are not very much to the point as they relate to the provisions of special acts and not to S. 517, Criminal Procedure Code. The powers under the section are very large, and the Magistrate's discretion under it is wide, for he can make such order "as he thinks fit" for the disposal of any property produced before him (vide *Russel Bibi* v. *Ahmed Musaji* [3]). Such discretion must, I take it, be exercised judicially, and if it has been so exercised, I do not think that we should interfere in revision, especially when the order has been confirmed by an appellate Court. In the present case prosecution witness No. 1 says, that he saw sovereigns being used for gambling, and when accused 1 to 3 were arrested eight sovereigns were found in 3rd accused's mouth, three in a towel or handkerchief tucked into his waist and one in 2nd accused's pocket. Under S. 3 of Act III of 1889 money employed or displayed for the purpose of gaming is liable to forfeiture, and consequently an order under S. 517, Criminal Procedure Code, for the confiscation of money employed or displayed for the purpose of gaming would be a legal order, for it would be an order passed on the lines of a statutory provision for similar cases and could not be deemed to be an arbitrary exercise of discretion. In this case, however, there is no definite proof that these particular sovereigns were employed or displayed for the purpose of gaming, but in view of the fact that sovereigns had been used for gaming and had been seen on the mat used by the gamblers, it is a most unreasonable presumption that the sovereigns found on accused 2 and 3 were some of those sovereigns. The eight sovereigns in 3rd accused's mouth can hardly be said to have been carried by him in this way in the ordinary course of business; and a very natural inference would be that he had snatched up the coins from the mat and concealed them in his mouth, and the inference is all the stronger from the fact that he had three other sovereigns tied up in a cloth at his waist. The inference as to these latter and the one sovereign found with 2nd accused that they were being employed for gaming is much weaker, but there is the circumstance that accused 2 and 3 have not explained their possession on any other

1. (1902) I. L. R. 26 B. 641. 2. (1904) I. L. R. 26 A. 270.
3. (1906) I. L R. 34 C. 347.

Appaji Iyer *In re.*

Ayling, J.

hypothesis. The evidence of defence witness No. 1 is incredible and if believed, would merely show that 1st accused was going to give him 12 sovereigns the following day to convert into jewellery. In a case under the Madras City Police Act III of 1888, *Queen Empress* v. *Bhashyam Chetti* [1] it has been held that the Magistrate was not required to hold an enquiry as to whether the money ordered to be forfeited had been used for gaming, that it was sufficient that the money etc., had been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him. If money were found in a gambler's purse and there were no circumstances to suggest that it had been employed for gaming, it would certainly be unreasonable to order its confiscation, but in this case there are circumstances from which the inference can be drawn that the sovereigns had been employed for gaming. As regards eight of them the inference is very strong, but the inference as regards the other four is much weaker, and while I am doubtful whether it can be said that the Magistrates have exercised their discretion in an arbitrary manner as regards these four sovereigns and that, I take it, would be the only ground for interference by this Court in a case of revision, I am not prepared to differ from my learned brother's opinion and agree in the order proposed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS CHIEF JUSTICE, AND MR. JUSTICE KUMARASWAMI SASTRI.

Doraisami Pillai, declared major (Vide order on C. M. P. No. 1533 of 1917.) ... *Appellant** (*Plaintiff.*)

*v.*

Chinnia Goundan and others ... *Respondents* (*Defendants* 1 to 5.)

Doraisawmi Pillai *v.* Chinnia Goundan.

*Hindu Law—Adoption—Consent of sapindas subsequently given, cannot validate—Deed—Construction—Release when operative as a conveyance—Pleadings—Amendment of—Events subsequent to the institution of the suit—Power of Court to take cognizance of, and grant relief accordingly—Suit for redemption claiming as heir—Relief on the strength of a conveyance from the true heir obtained by plaintiff subsequent to the institution of the suit, if can be granted.*

The subsequent assent of the *sapindas* will not validate an adoption by a widow who had no such assent at the time of the adoption.

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* A. S. No. 88 of 1916. 28th September 1917.

1. (1896) I. L. R. 19 M. 209.

Doraisawmi Pillai v. Chinnia Goundan.

A document though styled a release can be treated as a conveyance if it appears clearly that the intention of the executant of the document was to transfer his rights.

In 1914 plaintiff brought a suit for redemption of a mortgage executed by the widow of the last male owner, alleging that he was the son of a person adopted by the widow. The defendants in their written statement questioned the legality of the adoption of the plaintiff's father, whereupon the plaintiff obtained a conveyance of all his rights from the person who, but for the adoption, would be the heir of the last male owner on the death of the widow in the year 1902; and in a supplemental written statement filed by him plaintiff relied on the conveyance as giving him a right to redeem. An issue was also raised on the plea set up by the plaintiff in his supplemental written statement. It was found that though his adoption was invalid in law, the plaintiff's father had been in possession of the estate as the adopted son of the last male owner and that the plaintiff went into possession of the properties on the death of his father, without any objection from the reversioners; that the plaintiff had instituted the suit for redemption in the belief that his right was unquestionable; and that when plaintiff's title was questioned by the defendants he put himself right by obtaining a conveyance from the next reversioner. It was also found that at the time when the additional written statement was put in by the plaintiff and for a long time thereafter, the right to redeem the mortgage would not be barred and that otherwise there was no prejudice to the defendants by allowing the plaintiff to amend his claim. *Held* that, in the circumstances of the case, the Court should grant the plaintiff a decree for redemption on the title set up by him in his additional written statement without driving him to a fresh suit.

*Kishandas Rupchand* v. *Rachappa Vithoba* [1], Referred to.

*Mathura Mohan Saha* v. *Ram Kumara Saha and Chittagong District Board* [2], *Rangayya Reddy* v. *Subramania Iyer* [3], Distinguished.

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in O. S. No. 37 of 1914.

*C. V. Ananthakrishna Aiyar* for Appellant.

*P. R. Ganapathi Aiyar* for Respondents.

The Court delivered the following

Wallis, C. J.

**Judgments**:—*The Chief Justice*:—This is an appeal from a decision of the Subordinate Judge of North Arcot, dismissing a suit by the plaintiff for redemption of the mortgage Ex. VII executed by the senior widow of the last male owner on the 27th February 1875, and also for a declaration that a lease executed by her previously on the 28th October 1874 (Ex. XIII) is not binding on the plaintiff. The plaintiff's suit was based on the alleged adoption of his father by the junior widow of the last male owner in the year 1879. The last male owner died about the year 1850 and there is really no evidence of any authority given by him to his widow to make the adoption. Another question which arises

1. (1909) I. L. R. 33 B. 644. 2. (1915) I. L. R. 43 C. 790, 817.
3. (1917) I. L. R. 40 M. 365.

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is whether one widow could adopt without the consent of the other widow and then there is the question whether the adoption was made with the consent of the sapindas. On the latter question the Subordinate Judge has found that it is not shown that the adoption was made either with the consent of the senior widow or the sapindas. The next reversionerc omes forward now as plaintiff's 1st witness and says that he was present and consented. But in 1890 he filed a suit to declare the adoption invalid and little weight attaches either to his testimony or to the testimony of the 3rd witness of the plaintiff whom the Subordinate Judge has not believed. We are therefore not prepared to interfere with the finding of the Subordinate Judge that the consent of the sapindas at the time of the adoption has not been proved. There is considerable evidence that many years later, the reversioners gave their consent to the transaction. But we are not prepared in the absence of authority to hold that such subsequent assent of the sapindas would validate the adoption. The doctrine of the consent of the sapindas validating an adoption which was laid down by the Privy Council in the *Ramnad Case* was based largely upon the custom prevailing in this part of India, rather than upon cited texts. A different custom prevails in Bombay and Bengal. We are not prepared in the absence of any evidence or authority to hold that the custom under which the consent of the sapindas is held to validate adoption can be extended to consent given long after the date of the adoption and we think that considerable inconvenience and uncertainty would result from giving the doctrine any such further development. It is therefore unnecessary to consider the question of the alleged failure of the senior widow to give her consent or the effect of her having subsequently given it. On this finding the plaintiff's case as originally laid in the plaint must fail.

The adoption was not proved. But in a supplemental written statement which he put in, he relied on a release (Ex. R) which was executed in his favour after the filing of the plaint by the person who was the right heir of the last male owner on the death of the junior widow in 1902, if there was no adoption of the plaintiff's father. That document was entered into between the plaintiff who with his father before him had been in possession of the estate for a great many years on the footing of the adoption and the person who was entitled to succeed in 1902 if there was no

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adoption. By that document the heir released all his rights in favour of the plaintiff. We cannot agree with the Subordinate Judge that Ex. R., does not purport to be and is not a conveyance. The word used is 'release' but the intention to transfer any rights which the executant of the document has is clear and we see no sufficient reason why it should not be treated as a conveyance. The question next arises how far the plaintiff should be allowed to rely upon this title in the present suit. The matter was made the subject of an issue which was clearly in our opinion intended not only to raise the question whether he was entitled to put forward such a claim in this suit but also whether such a claim if put forward would be a good one. The Subordinate Judge held that Ex. R which was executed after the institution of the suit could not supply the plaintiff's want of title and it has been strenuously contended before us that a cause of action which arises subsequently to the institution of the suit cannot properly be included in the suit by amending the pleadings and must form the matter of a fresh suit. *A. G.* v. *Corporation of Avon*, [1] *Evans* v. *Bagshaw* [2], *Creed* v. *Creed* [3], *Prannath Sahah* v. *Madhu Khulu* [4], *Sarat Chandra Banerjee* v. *Apurpa Krishna Roy* [5], *Mathura Mohan Saha* v. *Ram Kumara Saha* and *Chittagong District Board* [6], *Rangayya Reddy* v. *Subramania Aiyar* [7]. The English decision relied on by the other side, *Bourke* v. *Davis* [8], is not strictly in point as what happened was that the plaintiff who discovered after the institution of the suit that he was not the owner of the bed of the river as he had supposed and obtained a conveyance of it was allowed to issue a fresh writ as to the infringement of his right as to the bed of the river and both suits were ordered to be tried together. There are no English decisions since the Judicature Act that such a course is absolutely incompetent and on the other hand as observed in *Kishandas Rupchand* v. *Rachappa Vithoba* [9], the discretion conferred under O. VI rule 17 (of the C. P. Code) and O. XXVIII Rule 1 of the English Rules is very wide. In the present case the plaintiff's father had been in possession of the estate as adopted son of the last male owner until his death with the consent of all the reversioners and the plaintiff had

1. (1863) 3 De. G & S. 637.
2. (1870) 5 Ch. 340.
3. (1913) Ir. Rep. 1 Ch. 48.
4. (1886) I. L. R. 13 Cal. 96.
5. (1911) 14 C. L. J. 55.
6. (1915) I.L.R. 43 C 790 at 817.
7. (1917) I.L.R. 40 M 855.
8. (1889) 44 Ch. D. 110.
9. (1909) I. L. R. 33 B. 644.

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succeeded him and instituted the present suit on the footing that his title was unquestionable, as indeed it was, so far as his family is concerned. When it was questioned by the defendant he at once put himself right as far as he could by obtaining Ex. R, from the next reversioner and put in an additional written statement on which an issue was raised apparently without objection. In this state of things I do not think that we are compelled in appeal to say that the amendment was wrongly allowed and that the issue as to the plaintiff's rights under Ex. R. was wrongly raised. To say that a plaintiff cannot be allowed to cure a formal defect in his title to sue at an early stage of the suit as soon as it is challenged and must be driven in every such case to a fresh suit appears to me to impose an undue hardship on litigants in India having regard to the state of the law as to court-fees and cost of litigation, and I do not think we are compelled by authority to adopt such a view as to interfere in appeal in any case where such an amendment has been allowed in the Lower Court. I am of course assuming that the amendment is otherwise proper and does not prejudice the other side. As regards the plaintiff's claim to redeem the mortgage, the mortgage had not yet become barred and will not be barred for a great many years more and in these circumstances we think that having regard to the issue which has been framed he should be given relief so far as regards the redemption of the mortgage. As regards his claim for a declaration that the prior lease is not binding upon him, that stands in a very different position because assuming there was no adoption the right of his assignor the next heir arose on the death of the last widow in 1902 and is alleged to have become barred even before the date of the assignment. We think it would be wrong to allow the plaintiff to question that lease in this suit. The position is a somewhat curious one. The lease (Ex. XIII) of the 29th October 1874 was a permanent lease of 3 villages executed by the senior widow in favour of one Papi Reddy, the ancestor of these defendants and the usufructuary mortgage (Ex. VII) of the 27th February 1875 was a mortgage by the same senior widow to a third party, of one of these 3 villages in which it was recited that she had arranged with Papi Reddy that the mortgagee's possession should not be interfered with, and by Ex. N, executed shortly afterwards on the 1st March 1875 in favour of the mortgagee, Narayanaswami Reddi, she affirmed the lease for the period of the usufructuary mortgage till the mortgage is redeemed. Then by Ex. IX of the

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14th March 1876 Narayanaswami Reddi, the mortgagee, assigned to Papi Reddy his rights under Ex. VII and Ex. N which was a supplemental lease in which it was recited that Papi Reddi has attested it to show that he had suspended his rights under the lease as regards this one village until the mortgage should be redeemed. Thus by Ex. IX of the 14th March 1876 the mortgagee assigned all his rights to Papi Reddy who thus united in his own original lease Ex. XIII, the mortgage Ex. VII and the lease supplemental to the mortgage, Ex. N. The result of these transactions is that on redemption the defendant will be entitled to remain in possession under the lease, Ex. XIII and subject to the terms of the lease which as we have already held cannot be questioned in the present suit, and there will be a declaration to that effect. The plaintiff is desirous of being allowed to redeem even on these terms. In the result we reverse the decree of the Lower Court and direct the Subordinate Judge to take the necessary accounts and pass a preliminary decree for redemption. The plaintiff must pay the costs of this appeal. The other costs to be dealt with in the decree.

*Kumaraswami Sastri, J*:—I agree.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS., CHIEF JUSTICE, MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Manjeshwara Krishnayya ... *Appellant* (3rd Defendant)*

*v.*

Vasudeva Mallayya and others ... *Respondents (Plaintiffs 1 to 5 and 1st Deft's. L. R.)*

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*Lis pendens—Doctrine applicable only as between opponents in a suit—Does not apply to alienations by parties ranged on the same side and between whom there is no issue—Transfer of Property Act, S. 52—"Any other party" meaning of—Should receive a restrictive construction.*

The principle of *lis pendens* is only applicable as between opponents with regard to alienations made by any one of them during suit.

*Bellamy* v. *Sabine* [1], *Faiz Husainkhan* v. *Prag Narain* [2], Referred to.

The language of S. 52 of the Transfer of Property Act, which enacts that property cannot be transferred by any party to the suit or proceeding so as to affect

*L. P. A. No. 283 of 1916. 21st September 1917.

1. (1857) 1 De G. and S 566. 2. (1907) I. L. R. 29 A. 339 at 345 (P.C.)

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the rights of *any other party* thereto, does not compel the courts to apply the doctrine as between parties to the suit who are arrayed on the same side and between whom there is no issue for adjudication.

The expression "or any other party" in S. 52 should receive a restricted construction and means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips in S. A. No. 1736 of 1914 preferred against the decree of the District Court of South Canara in A. S. No. 45 of 1913 preferred against the decree of the Court of the Subordinate Judge of South Canara in O. S. No. 60 of 1911 (O. S. No. 63 of 1906 on the file of the District Court of S. Canara.

The Second Appeal came on for hearing before their Lordships Oldfield and Phillips, JJ. who delivered the following

Oldfield, J.

**Judgments** :—*Oldfield, J* :—Plaintiffs sue to recover on a mortgage on the suit property, admittedly executed by 1st defendant in favour of their predecessors in interest, 3rd defendant. The appellant is a transferee of the property from 2nd defendant, who is a transferee from 1st defendant in virtue of transactions to be detailed later. 3rd defendant's contention is that the mortgage is invalid, because it was entirely without consideration. The lower Appellate Court decided against this on the ground that 3rd defendant was concluded by the decision in Second Appeal No. 323 of 1902; it modified the decree of the Subordinate Judge only on another point, regarding which there is no dispute before us.

For the understanding of the effect of the decree in Second Appeal No. 323 of 1902 the necessary facts are that 1st defendant bought the property from one Manjunatha, leaving rupees one thousand and five hundred of the consideration outstanding, rupees one thousand on a promissory note and rupees five hundred, which had not been paid, when it should have been, at registration. This rupees one thousand five hundred and another sum of rupees five hundred, which does not affect the present argument, were raised by 1st defendant by the suit hypothecation of the property to plaintiff's predecessor. 2nd defendant, holding a decree against Manjunatha attached the debt due to him by 1st defendant and, proceeding against the latter, obtained a decree and bought in the property, thus becoming the mortgagee of plaintiff's predecessor. Manjunatha, apparently apprehensive of competition between his right to a charge for unpaid purchase money and the mortgage, brought Original Suit No. 114 of 1898 to have the mortgage and also the previous sale to 1st defendant declared invalid on the grounds that they were colourable and without consideration. The High Court in Second Appeal No. 323 of 1902 held that the sale was valid and that the mortgage was valid subject to Manjunatha' claim to his unpaid purchase money, the principal of which it found to be rupees one thousand, the amount above referred to as due on a promissory note. This judgment is the basis of the lower Appellate Court's decision against 2nd defendant and 3rd defendant. The parties to it were Manjunatha as plaintiff and 1st defendant, his wife, and plaintiff's predecessor as defendants. In the second appeal, the last mentioned was appellant and the legal representatives of Manjunatha, 1st defendant and his wife, were respondents. Throughout the proceedings plaintiffs' predecessor and 1st defendant upheld the validity of the mortgage.

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Contrary to 1st defendant's previous pleading, his successors 2nd and 3rd defendants have contended in the present suit that the mortgage was without consideration and is not binding on them or the property in the latter's hands. And accordingly the case has been argued first on the ground that they are estopped by 1st defendant's conduct in Second Appeal No. 323 of 1902. That can be dismissed shortly, because no such plea of estoppel was advanced, put in issue or considered in the Lower Courts. Next it is said that the decree in the Second Appeal is *res judicata* between plaintiff and 3rd defendant; and to this two answers have been given. It is argued firstly that, although the decree declared validity of the mortgage, subject only to Manjunatha's prior right to rupees one thousand, the judgment, which modified the decision in first Appeal by adding to it a reference to that right, statedly made that reference as between Manjunatha and plaintiff's predecessor, thus leaving the question of the validity of the mortgage and the amount recoverable on it open as between the latter and 1st defendant. This restriction of the effect of the decision regarding the rupees one thousond is intelligible. (because as the records show) the original judgment had recognized Manjunàtha's object as not so much to have the mortgage " set aside as to have it rendered of no effect, so far as it affected his property; it was not his interest whether 1st defendant owed any money or not to 3rd defendant; " and the main ground of second appeal against the decisions declaring the mortgage invalid was that Manjunatha had no right to ask for that elief. But, whatever the reason for it, the making of the restriction in the judgment cannot assist the 3rd defendant, because it was not mentioned in the decree, to which 1st defendant submitted and which must be looked to, rather than the judgment, as determining the parties' rights. The second argument relied on however affords á clear reason for holding that the decree in Second Appeal No. 323 of 1902 is not *res judicata*. Plaintiff's predecessor and 1st defendant were co-defendants and were so far from being in active contest that their pleas as to the validity of the mortgage and Manjunatha's right to dispute it were substantially the same; and in these circumstances there is no *res judicata* between them. *Ramachandra Narayan* v. *Narayan Mahadev* [1], *Venkayya* v. *Narasamma*, [2].

It is therefore necessary to consider the third ground of decision proposed by plaintiffs, that adopted by the lower Appellate Court and based on the principle of *lis pendens*. The difficulty in the way of its application is not due to any doubt as to contentious character of Second Appeal No. 323 of 1902 or the fact that the transfer to 2nd defendant was made during the litigation. It is that the principle, as contended for, involves that the decision relied on shall be binding on the transferee, not only as it would have been on the transferor, but also to the extent to which there was an adjudication on the rights of any other party, whether the adjudication affected those of the transferor or not; in short that in the present case, although there was no binding decision between 1st defendant and plaintiff's predecessor as to the invalidity of the mortgage, 3rd defendant is to be affected by one between Manjunatha and each of them separately.

To test this contention with reference to section 52 of the Transfer of Property Act; the wording no doubt is general, and is not restricted explictly to the protection of those parties only, who have been in active controversy with the transferor. But it cannot in my opinion be read as plaintiffs claim, as a general prohibition against the subsequent agitation of every question, which arose in the litigation, between whomsoever it was decided. That reading would refuse full effect to the words "the rights of any other party." For it would involve the fallacy of

1. (1886) I. L. R. 11 Bom. 216. 2. (1887) I. L. R. 11 M. 204.

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treating the right protected as existing, like an obligation running with the property independently of the party in whose favour it was decreed; and so much conceded, it would, as is pointed out in the first case referred to, be hard to permit other parties to the litigation to profit by its recognition, though (as in the present case) they had obtained no binding adjudication regarding it, and at the same time to refuse permission to strangers to do so.

Authority supports this view; and, though it is mostly English, it does not appear inapplicable in this country owing to the English procedure of registration of *lis pendens* or on other grounds. *Bellamy* v. *Sabine* [1] contains a general statement of the doctrine, which has often been approved by Indian Courts. It is also directly in point, becuase it dealt with the competition between one of two co-defendants and the other's transferee, the former claiming unpaid purchase money and the latter under a mortgage made during the litigation. The decision was in favour of the transferee, the matter being put most clearly in the judgment of Turner, L. J. "Laying out of consideration the cases (which are rare), in which decrees can be made between co-defendants." (and also presumably those in which there is an adjudication between them after active contest) "upon what ground is the case of a co-defendant to stand in a different position from that of a stranger? And if the doctrine of *lis pendens* is to be carried so far as to affect a purchaser with notice in favour of a stranger, I hardly know what title would be safe, independently of later Acts requiring registration." In the next case. *Taylor* v. *Thomas* [2] the doctrine was applied but the decisive factor in favour of its application was that, though there was no adjudication between the co-defendants, concerned, an issue was raised between them and reserved for subsequent trial, *Bellamy* v. *Sabine* being distinguished on that ground. In *Bull* v. *Hutchens* [3] it was held that "a *lis pendens*, is merely notice of some claim made in respect of the property which is the subject of the suit but that it does not of itself create an encumbrance apart from the equity on which the litigation is founded." Only one Indian case need be mentioned. In *Shivlal Bhagwan* v. *Shambuprasad* [4] a Full Bench decision, the Court though it bases its conclusion on another ground, referred to *Bellamy* v. *Sabine* apparently with approval, as deciding that the doctrine of *lis pendens* operated only in favour of a plaintiff and could not be invoked by defendants.

Plaintiff's construction of the section failing on its merits and with reference to authority, I would allow the second appeal, set aside the lower Appellate Court's decision and remand the case for disposal on the other points raised in the Appeal Memorandum before it.

Phillips, J.

*Phillips*, *J.*—The properties mortgaged to the father of plaintiffs 1 and 2 by 1st defendant had been sold to 1st defendant by one Manjunatha Bhandari who brought a suit in 1898 (Original Suit No. 114 of 1898, Sub-Court, Mangalore) for a declaration that the sale deed to 1st defendant and the hypothecation deed executed by him to the father of plaintiffs 1 and 2 (3rd defendant in that suit) were invalid. In second appeal No. 328 of 1902 it was held that the sale-deed and mortgage were both valid. During the pendency of the litigation 2nd defendant purchased the property from 1st defendant and 3rd defendant is 2nd defendant's transferee and it has been held by the lower Appellate Court that the doctrine of

1. (1857) 1 De G. and J. 566.
2. (1858) 25 Beav. 47.
3. (1863) 32 Beav. 615.
4. (1905) I. L. R. 29 Bom. 435.

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*lis pendens* is applicable and therefore 3rd defendant cannot now question the validity of the mortgage to 1st and 2nd plaintiff's father.

As between Manjunatha Bhandari and plaintiffs the validity of the mortgage is undoubtedly *res judicata*, and also as between Manjunatha Bhandari and 1st defendant. But it is contended now that as 1st defendant and plaintiff's father were co-defendants in the suit of 1898 the validity of the mortgage is not *res judicata* as between them, for no question of *res judicata* can arise between co-defendants when there was no matter actively in contest between them, the decision of which was necessary for the determination of the suit. This would appear to be the case, and I am not prepared to say that the prior decision in Second Appeal No. 823 of 1902 would operate as *res judicata* between 1st defendant and plaintiffs, although the former might be estopped from questioning the validity of the mortgage, the validity of which he has himself set up in that litigation. It is then contended for respondents that even though the doctrine of *res judicata* may not apply to 3rd defendant, he is precluded from disputing the validity of the mortgage by reason of section 52 of the Transfer of Property Act under which during the active prosecution of a contentious suit the property concerned cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree made therein.

This contention if upheld, would in this case possibly have the effect of disabling a purchaser even more effectively than his transferor to whom the doctrine of *res judicata* would apply, but cannot be rejected on this ground alone. S. 52 of the Transfer of Property Act embodies the English doctrine of *lis pendens* as applicable in Courts in India, and the principle on which that doctrine rests is that no alienation by either party to a pending litigation is to be allowed to prejudice the interests of the parties thereto. In the words of the Lord Chancellor in *Bellamy* v. *Sabine* [1], " The law does not allow litigant parties to give to others, pending the litigation rights to the property in dispute so as to prejudice the opposite party." We have not been referred to any cases in which the question now in issue has been specifically decided and consequently I think that the provisions of S. 52 must be relied upon for the answer. The decree in Second Appeal No 823 of 1902 held that the mortagage to plaintiff's father was valid subject to a claim for unpaid purchase money, and that decree was binding on 1st defendant who was a party to it. No doubt it is remarked in the judgment that the decree of the lower Courts will be modified as between the plaintiff and the 3rd defendant (plaintiff's father) but that remark appears to be due to the fact that 3rd defendant alone appealed to this Court and 1st defendant was *ex parte* and it is clear from the decree itself that the mortgage was upheld to be valid and not merely as between plaintiff and 3rd defendant. The effect of the decree therefore, was to establish the right of plaintiff's father to a valid mortgage on the suit property and under S. 52 no transfer effected during the suit can affect that right. 1st defendant as a party is bound by that decree and does not now seek to impeach its validity. To allow 3rd defendant in this suit to contend possibly to prove that that right does exist would certainly affect plaintiff's right established by the decree and although the declaration as to the right might not be conclusive as between 1st defendant and plantiffs as *res judicata*, yet it is a declaration binding on 1st defendant until he seeks to impeach it. He does not impeach it now, and consequently its impeachment by his alienee does seriously affect plaintiff's rights and therefore in my opinion cannot be allowed. I can find no authority for the proposition that the scope of the doctrine of *lis pendens* must be limited to cases in which the doctrine

1. (1857) 1 De G. and J. 566.

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of *res judicata* would apply to the transferor, and if the legislature had meant to enunciate that proposition it could have done so in terms instead of enacting S. 52 in its present form. According to the language of S. 52 the transfer to 2nd defendant cannot affect plaintiff's right to a valid mortgage over the property, a right which he obtained as the result of the suit during which the property was transferred. The transfer to 2nd defendant must therefore, be deemed to have been made subject to that right and 3rd defendant cannot now impeach the validity of the mortgage.

In this view it is unnecessary to discuss the question of estoppel. The question was not raised in the lower Courts and cannot be raised for the first time in Second Appeal, although it is quite possible that, if 1st defendant had in this suit impeached the validity of plaintiff's mortgage, the plea of estoppel would have been raised and proved successfully.

*The Court*:—The appeal is dismissed with costs

[This Appeal under Cl. 15 of the Letters Patent against the Judgment of Phillips, J., came on for hearing before the Bench as constituted above.]

*B. Sitarama Row* for Appellant.

*A. Narasimhachariar* for *V. V. Srinivasa Aiyangar* for Respondents.

The Court delivered the following

Wallis, C. J.

**Judgments**:—*The Chief Justice*:—Manjunatha Bhandari filed a suit O. S. No. 114 of 1898 for a declaration that the sale deed of the suit properties which he had executed in favour of the 1st defendant in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the 1st defendant in favour of the 3rd defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Ex. D, as if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, the 1st defendant, to the 3rd defendant, the father of the present plaintiffs. The 1st and 3rd defendants in that suit made common cause and succeeded in upholding the validity of the sale under Ex. D, subject to the plaintiff's lien for unpaid purchase money. The 1st defendant in his written statement admitted his mortgage to the 3rd defendant, and as, there was no contest about the mortgage, what the High Court apparently decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase money in priority to the 3rd defendant's mortgage. While this suit O. S. No. 114 of 1898 was pending, the present 2nd defendant, by Ex. H dated 18-12-1899, acquired the 1st defendant's interest in the suit properties at a sale in execution. It is well-settled that the doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties, and the

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question before us is whether the 2nd defendant's purchase from the 1st defendant pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present 2nd defendant as alienee from the 1st defendant from disputing the validity of the mortgage executed by the 1st defendant to the 3rd defendant, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by the 1st to the 2nd defendant pending suit is affected by the doctrine of *lis pendens* as embodied in S. 52 of the Transfer of Property Act. As there was absolutely no contest on the point between the 1st and 3rd defendants in that suit, it seems clear that the present case is not within the English doctrine as to *lis pendens* which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord Cranworth in *Bellamy* v. *Sabine* [1], where he observes that *lis pendens* affects a purchaser, "not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute so as to prejudice the opposite party". Later on he observes "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent", and in *Faiyaz Husain Khan* v. *Prag Narain* [2], Lord Macnaughten, delivering the judgment of the Judicial Committee in a case governed by S. 52 of the Transfer of Property Act, referred to this as the 'correct mode of stating the doctrine'. If then the English doctrine and the principle on which it rests is only applicable as between opponents with regard to alienations made by any one of them during suit, does the language of S. 52 of the Transfer of Property Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication ?. The section provides that "during the active prosecution—of a contentious suit or proceeding in which any right to immoveable property is directly or specifically in question the property cannot be transferred—by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein." It is not I think putting an unduly restrictive construction on the section to say that "any other party" whose rights are not to be affected means any other party who can be

1. (1857) 1 De. G. and 566 : 44 E. R. 842.
2. (1907) I. L. R. 29 A. 339, 345.

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said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. In other words, "any other party" in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

To hold otherwise would have strange and incongruous results which cannot have been contemplated by the legislature. The law of *lis pendens* is an extension of the law of *res judicata*, and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of *res judicata* does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of the mortgage would not be *res judicata* as between the present plaintiffs, the representatives of the 3rd defendant in the former suit, and the 1st defendant in that suit and this, or between them and the 2nd defendant if the alienation by the 1st defendant to the 2nd defendant had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of S. 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor, and transferees from his transferor after decree are at liberty to raise. In these circumstances, I think we are justified in placing a restrictive construction on the language of S. 52 so as to avoid this incongruity and to bring the section into line with the English law, more especially as the observations of Lord Macnaughton already referred to seem to support this interpretation. This is the construction put on the section by Oldfield, J. with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in S. A. No. 323 of 1902 on appeal from the decree of the District Judge in A S No 299 of 1900 affirming the decree of the District Munsif in O. S. No. 114 of 1898 contains a declaration of the validity of the mortgage Ex. I, by the 1st defendant to the 3rd defendant subject to the plaintiff's claim for Rs. 1,000 for

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unpaid purchase money which it is said amounts to an adjudication on the question, I may state that this declaration is not in my opinion an adjudication between the 1st and the 3rd defendants in that suit. In their judgment, Ex. E, the High Court expressly directed the decree of the Lower Court to be modified by the insertion of this declaration as between the plaintiff and the 3rd defendant and accepted the findings of the Lower Court one of which was that the mortgage by the 1st defendant to the 3rd defendant was fraudulent and without consideration, (para. 5)." It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and the 3rd defendant. But, as already pointed out, in result of the suit the plaintiff was not concerned with the validity of the mortgage seeing that it was postponed to his claim for unpaid purchase money and that he had failed to set aside his sale to the 1st defendant; and probably all that was meant was that the mortgage, which the 1st defendant the mortgagor did not dispute, was to be subject to the plaintiff's lien for Rs. 1000 for unpaid purchase money. In the result I agree with Oldfield, J. and would allow the Letters Patent appeal with costs and make the order proposed by him.

*Bakewell J*:—I agree.

*Kumaraswami Sastri, J*:—I agree.

C. A. S.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Grande Gangayya ... *Appellant* * (*Appellant Plaintiff.*)

*v.*

Grande Venkataramiah and others ... *Respondents* (*Respondents Defendants.*)

Gangayya v. Venkataramiah.

*Partnership—Dissolution—Right to sue for—Hindu Law—Joint family—Managing member entering into partnership with stranger—Partition among members of family—Right of one or some of other members to sue for dissolution of the partnership—His or their remedy in such cases.*

A member of a joint Hindu family does not become *ipso facto* a partner by reason of a contract of partnership entered into by the managing member of his family with a stranger. In such a case the position of the other member or members of the family is no higher than that of a sub-partner. *Held*, therefore,

* L. P. A. No. 261 of 1916. 20th September, 1917.

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that the other member and members could not, after becoming divided in status, sue for dissolution of the partnership.

Remedy of the other member or members in such cases discussed.

Appeal under Clause 15 of the Letters Patent against the decision of the Honourable Mr. Justice Spencer dated 20th October 1916 in S. A. No. 1807 of 1915 preferred against the decree of the District Court of Kurnool in A. S. No. 163 of 1914 preferred against the decree of the Court of the District Munsif of Kurnool in O. S. No. 885 of 1913.

(The second appeal came on for hearing before Spencer and Phillips, JJ.) *A. Krishnaswami Aiyar* for Appellants.

*K. V. Krishnaswami Aiyar* for the Respondents.

The Court delivered the following

Spencer, J.

**Judgments** :—*Spencer, J*:—This suit was brought by a junior member of an undivided Hindu trading family to compel dissolution of the trade partnership, the Manager of the family and a stranger partner being joined as 1st and 3rd defendants respectively. Both the Lower Courts were of opinion that the plaintiff had misconceived his remedy, that not being himself a partner, he had no right to ask the Court to dissolve the partnership under S. 254, Contract Act, and that his suit should consequently be dismissed. I have no doubt that they were right.

It is not denied that the plaintiff, who recently attained majority, has already entered into a partition of certain other family properties with the 1st and 4th defendants who were members of the joint family, but the share he is entitled to in the business has not yet been ascertained and withdrawn from the firm's assets.

It has been found as a fact by both the Lower Courts that the 1st defendant entered into partnership with 3rd defendant, as Manager of the family consisting of himself and the plaintiff and the 4th defendent, for the benefit of all the members of the family.

What then is the position in law of a junior member of a joint Hindu family which trades in partnership with a stranger?

The family as a whole is not a partner. The fallacy of that idea has been exposed in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* [1] and *Ramanathan Chetty* v. *Yegappa Chetty* [2].

Members of an undivided Hindu family no doubt may enter into contracts of partnership in their individual capacity (vide *Ananthram* v. *Channu Lal* [3].) But minors in India cannot become partners in their own right, as partnership involves consentient acts on the part of the contracting parties (vide the illustrations to S. 239 of the Contract Act), and a minor is incapable of contracting by reason of Sec. 11 of the Contract Act. This has been explained by Mr. Justice Sale in his judgment in *Lutchmanan Chetty* v. *Sivaprakasa Mudaliar* [1] and by Mr. Justice Batchelor in *Raghunathji Tarachand* v. *The Bank of Bombay* [2]. It was not, and could not be, seriously contended at the hearing of this appeal that this plaintiff was a partner in the firm during his minority, and the District Judge has found that he has not entered into any such agreement subsequently. Nor can it be pretended that he has been admitted to the benefits of the partnership, as minors may be admitted under Sec. 247 of

1. (1904) I. L. R. 28 M. 344.

2 (1915) 30 M. L. J. 241.

3 (1903) I. L. R. 25 A. 378.

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the Act; for this would require a definite and conscious act of admission on the part of all the adult partners, of which there is no trace in this case. The plaintiff's case seems to be that he acquired status of partner by birth. But this is not a necessary consequence of co-parcenery, as Mr. Justice Sale has been careful to point out. To hold that all the rights and obligations of a partner are incidental to the interest of every co-parcener in a joint Hindu family which possesses a family trade would be to assume that he has higher rights of management over the property of the firm than he enjoys in respect of other family property, in dealing with which the managing member represents all the members of the undivided family in business transactions for necessary purposes. Vide *Ghari Bullah* v. *Khalak Singh* [1] and *Arunachalam Pillai* v. *Vythialinga*

A manager of a joint Hindu family is not the guardian of the property of the minor co-parceners, for the reasons given in the Privy Council decision referred to just above, nor is he their agent. (Vide *Annamalai Chetty* v. *Murugesa Chetti* [3].) His position resembles that of a trustee, but it is not identical with that of a trustee; for he cannot, in the absence of fraud or misappropriation, be called upon to account for his past dealings with the family property. *Vide Balakrishna Aiyar* v. *Muthusami Aiyar*, [4]

The only possible remaining position is that the manager of the family in partnership with a stranger is in law the sole partner representing the interest of the joint family in the firm and that the other co-parceners have only such contro over the family assets invested in the business of the firm as they have by Hindu law over other co-parcenary property. That this is true theory as to the relationship of the parties is evident from the decisions in *Vadilal* v. *Shaw Khushal* [5], *Sanka Krishnamurthi* v. *The Bank of Burma* [6], *Ananth Ram* v. *Channu Lal* [7], and the Privy Council decision in *Kishen Prasad* v. *Har Narain Singh* [8].

The plaintiff's rights as a co-parcener will extend, therefore, to obtaining a partition of his proportionate share of the joint family property, so far as a portion of it still remains undivided, but in a suit instituted for that purpose, the 3rd defendant will not be a necessary party, as there is no privity of contract between them and as he cannot be deemed to be in wrongful possession of the plaintiff's property before even the outstanding debts, if any, due to the family at the time of partition have been distributed among the members of the family, and before even the share that will fall to the plaintiff at the distribution has been ascertained. Although the plaintiff is entitled to receive from the 1st defendant his proportionate share of the family capital invested in the business, the 1st defendant cannot be made to account for the profits derived in the years prior to the partition, as these have presumably been expended in the maintenance of the joint family. There has been no petition to amend the plaint and although the point has been taken in the grounds of second appeal that the District Judge should have permitted an amendment, I do not see why he should have allowed the character of the suit to be changed by treating this as a suit for partition, in the absence of a petition and so long as the appellant persisted in maintaining that the suit as instituted would lie. No doubt the plaint contains prayers for the appointment of a Commissioner to examine the accounts of the firm and of a Receiver to take possession of the property,

1. (1903) I. L R 25 A. 407.
2. (1882) I. L. R. 6 M. 27.
3. (1902) I. L. R. 26 M. 544=13 M. L. J. 287.
4. (1908) I. L.R. 32 M 271=19 M. L. J. 70.
5. (1902) I.L. R. 27 B 157
6. (1911) I. L. R. 35 M 692=21 M. L. J. 620.
7. (1903) I. L. R. 25 A 378.
8. (1911) I. L. R. 33 A 272

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but these reliefs were asked for on the footing that the plaintiff had a partner's right to demand them, as may be seen from the fact that he asked that possession of the entire property, and not of his share alone, might be given to the Receiver. In my opinion the only course before us is to dismiss this second appeal with costs, leaving the plaintiff to work out such rights as he may have in a properly constituted suit. My learned brother is of opinion that the appeal should be allowed. The result is that the appeal is dismissed with costs.

Phillips, J.

*Phillips, J*:—Plaintiffs and defendants 1 and 4 were members of an undivided family and 1st defendant as manager and on behalf of his family entered into a trading contract with 3rd defendant. Subsequently plaintiff and defendants 1 and 4 became divided, and effected an actual partition of a considerable portion of the family property, but the property invested in the joint trade with 3rd defendant was not divided. Plaintiff now sues to recover his share in that trade, and asks for a dissolution of the partnership and for accounts to be taken. His suit has been dismissed on the ground that he is not a partner and, therefore, cannot sue for dissolution of partnership. Against this decree plaintiff appeals and bases his appeal on three grounds;—

1. All the members of an undivided family are parties to a contract entered into by the manager on behalf of the family and consequently plaintiff is a partner by virtue of being a party to the contract of partnership.

2. If the manager of the family is alone a partner, he must be treated as a trustee in respect of plaintiff's share of the property and must restore that share by enforcing a dissolution of partnership; and,

3. After partition the authority of the manager to deal with plaintiff's share is gone and consequently plaintiff is entitled to follow his property in the hands of the manager and of his partner, 3rd defendant, who has knowledge that the authority has ceased.

I do not think that the first contention that plaintiff is a partner in the firm can be upheld. Even in the case of a joint family business, in which no stranger is a partner, it has been repeatedly held that all the members of the undivided family are not necessarily partners in the strict sense of the term and a member can only be deemed to be a partner when he has held himself out as such or has done some consentient act, which shows that he is a partner. (vide *Chalamayya* v. *Varadayya* [1], *Lutchmanan Chetty* v. *Sivaprakasam Mudaliar* [2], *Vadi Lal* v. *Shah Kushal* [3] and *Bishambar Nath* v. *Fateh Lal* [4].) This proposition would apply with greater force when the joint family through its managing member becomes a partner with a stranger. It has also been held that when the managing member who enters into a partnership contract with a stranger, dies, the partnership is dissolved. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* [5], *Ramanathan Chetty* v. *Yegappa Chetty* [6]. This clearly negatives the theory that the whole family as a corporate body is the partner, and that the death of the managing member does not entail dissolution, on the ground that the corporate body is still alive so long as one member of the family survives. No doubt, all the members of a joint family are partners in the sense that they are entitled to a share of the profits, and that their share of the family property is liable for the debts of the joint firm (vide *Raghunathaji Tarachand* v. *The Bank of Bombay* [7] and *Joharmal Ladhooram* v. *Chetram Harisingh* [8]) but they cannot be strictly

1. (1898) I.L.R. 22 M. 166=9 M.L.J. 3.
2. (1899) I.L.R. 26 C. 349.
3. (1902) I.L.R. 27 B. 157.
4. (1906) I.L.R. 29 A. 176 at 182.
5. (1904) I.L.R. 28 M. 344.
6. (1915) 30 M.L.J. 241.
7. (1909) I.L.R. 34 B. 72.
8. (1914) I.L.R. 39 B. 715

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considered as partners in the business so as to have conferred upon them all the rights and liabilities of a partner under the Contract Act. It cannot, therefore, be contended that plaintiff is entitled as a partner to sue for dissolution under S. 254 of the Contract Act. A great deal of argument was addressed to the court on the question of whether a minor can be a partner, but in the present case, I think it is unnecessary to deal with that question, for it only becomes necessary for determination in case the members of an undivided family become members of a partnership by the mere fact of the managing member entering into a partnership on their behalf. As I have pointed out, this is not the case, and consequently the further question whether, even if majors become partners, minors can also be partners, needs no discussion. A further contention was raised that the partition of 1st defendant's family created a dissolution of the partnership, and reliance is placed on two sentences of their Lordships of the Privy Council in *Joopoody Sarayya* v. *Lakshmanaswami* [1]. "It has to be admitted that, if a partition has taken place of the joint family property, it is at least not unlikely that that would have extended to all the businesses which the joint family shared; and it must further be conceded that, if the joint family's interests were divided, a dissolution of the Akuvidu partnership with Venkanna was naturally incident to the situation thus created. Different *personae* had arisen in law, and with these, it was open to Venkanna to say whether he should be allied in partnership or not." As pointed out in *Ramanathan Chetty* v. *Yegappa* [2] *Chetty* this dictum cannot at all be regarded as authority for the proposition, although it might be used to support a contention, that the partnership could be dissolved at the instance of one of the partners on the ground of partition in the family of another partner.

The second two contentions can be dealt with together for they are practically the same; although the second contention emphasises the position of the Manager as a trustee more strongly than the third, I do not think it can be denied that the nature of a joint Hindu family in many ways very closely resembles a partnership, although all its members cannot necessarily be treated as partners within the meaning of the Contract Act, yet they have rights *inter se* which have to be determined apart from the provisions of that Act. A manager of a joint family is not strictly a trustee for the other members, but the moment partition takes place a different state of affairs is constituted. The manager no longer has power to deal with the whole family property as he pleases, but is found to give to each member his own share which must be ascertained as at the date of partition. When there has been a division in status, and until there is actual partition by metes and bounds, the manager holds the property on behalf of the other members, and is in effect a trustee for them, and can be compelled to account at the instance of any one of them. It is conceded on behalf of respondents that plaintiff has a cause of action against 1st defendant, but, as 1st defendant cannot ascertain and give to plaintiff his share in the business without 3rd defendant's acquiescence, it is suggested that plaintiff ought to sue to compel 1st defendant to bring a suit for dissolution against 3rd defendant. This seems to be a very clumsy method, involving an unnecessary amount of litigation and should not be resorted to unless it is clear that plaintiff has no direct remedy against 3rd defendant, for if plaintiff has any equity against third defendant, I think the Court should incline towards that equity rather than encourage a multiplicity of suits. 3rd defendant entered into a partnership with 1st defendant, knowing that the latter was trading on behalf of his joint family and also knowing that

1. (1913) I. L. 36 M. 185 at 192 2. (1915) 30 M. L. J. 241

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the whole family assets would be available for the trade. 3rd defendant is now aware that the 1st defendant no longer has authority to deal with the shares of the other members. By keeping plaintiff's share in the business, 1st defendant is doing an act which he is not warranted in doing for he is risking plaintiff's share of the business without plaintiff's authority. He is bound to account for and hand over plaintiff's share in the family property, which includes a share in the joint trade with 3rd defendant and consequently by continuing to trade with plaintiff's money he is committing a breach of trust. 3rd defendant is aware of this breach of trust, and consequently applying the principle laid down by Lord Cairns in *Vyse* v. *Foster*[1] that if partners trade with trust money knowing that its employment in that way is a breach of trust, they incur the same liabilities as if they were themselves trustees. In this view, 3rd defendant is liable equally with 1st defendent to account to plaintiff for his share in the business, and I can see no reason why he should not be impleaded in this suit. It is perhaps doubtful whether it is necessary to enforce a dissolution of partnership between 1st defendant and 3rd defendant, although possibly that would be the easiest way of ascertaining plaintiff's share, for it will be enough for the satisfaction of plaintiff's claim to have an account taken of the partnership and his share ascertained, and under S. 254 of the contract Act a Court can only dissolve a partnership at the instance of a partner. Under Hindu Law any member of a joint family can enforce a dissolution of a partnership that exists between the members by a demand for partition, and when a partnership exists between that family and a stranger it might well be that he can, in equity, demand the dissolution of that partnership, also if necessry to recover his share. In this case, however, it is unnecessary to go so far as that, because a decree for taking of the partnership accounts and for delivery of his share as then ascertained to plaintiff will be sufficient remedy. I would therefore allow the appeal and give plaintiff a decree as above with costs throughout.

*B. Sitarama Rao* for *A. Krishnaswami Aiyar* for Appellants.

*K. V. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

Kumaraswami Sastri, J.

**Judgments** :—*Kumaraswami Sastri, J.*—The question for decision is whether it is open to a member of a Hindu family who has become divided in status to sue for dissolution of partnership entered into between the managing member of the family and strangers, when the family was joint.

Ss. 254 and 265 of the Indian Contract Act only contemplate suits by one of the partners (as defined in S. 239) for dissolution of partnership and the taking of partnership accounts and there is nothing in the Act which confers such right of suit on a person merely by reason of his being entitled to a share in the interests of one of the partners in the firm. Such a person cannot be in a better position than a sub-partner and it is settled law that he has no right to ask for dissolution of patnership or the taking of the partnership accounts, there being no contract or privity except between him and the partner with whom he is a sub-partner.

1. (1874) L. R. 7 H. L. 318 at 333.

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In the present case the plaintiff was not admitted as a partner in the firm during his minority so as to entitle him to the benefit of Section 247 of the Contract Act or after he became a major so as to make him a partner within the meaning of S. 239. The only ground on which he became a partner in the firm is that he became in law a partner of the firm when the managing member of the family entered into the contract of partnership with the 3rd defendant or when owing to a partition between himself and the other members of the family he became entitled to a specific divided share in the joint family properties.

It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in S. 239 of the Contract Act. I need only refer to *Sokkanada Vannimundar* v. *Sokhanada Vannimundar* [1], *Ramanathan Chetty* v. *Yegappa Chetty* [2], and *Vadilal* v. *Shah Kushal* [3]. It is no doubt true that as between the members of the undivided family and the coparcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits, but this will not place them in any position of direct contractual relationship with the other partners of the firm. Nor would the fact that the entire assets of the joint family might be available to the creditors of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is as pointed out by their Lordships of the Privy Council in *Annamalai Chetty* v. *Murugesa Chetti* [4], more analogous to that of a trustee.

If a member of a joint family does not become *ipso facto* a partner by reason of the contract of partnership entered into by a member of his family, it is difficult to see on what ground a partition would place him in a better position. Reliance

1. (1904) I. L. R. 28 M 344.
2. (1915) 30 M. L. J. 241.
3. (1902) I. L. R. 27 B. 157.
4. (1903) I. L. R. 26 M. 545.

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has been placed by Mr. Sitarama Row on the observations of their Lordships of the Privy Council in *Joopoody Sarayya* v. *Lakshmanaswami* [1], to the effect that different *personae* arose in law on a partition between members of a joint family one of whom was carrying on business on partnership with a stranger so as to entitle the stranger to refuse alliance in partnership with the divided members. What their Lordships were considering was the question of fact as to when a partnership became dissolved so as to attract the provisions of Art. 106 of the Second schedule of the Limitation Act and I entirely agree with the observations of Coutts Trotter, and Srinivasa Aiyangar, JJ., in *Ramanathan Chetti* v. *Yegappa Chetti* [2] to the effect that their Lordships cannot be taken to have overruled the decisions of Indian Courts as to the position of co-parceners in relation to a partnership entered into by one the members of the family.

When there has been a partition between the members of a family all that the divided co-parcener can do is to call upon the managing member or co parcener partner of the firm to get in the assets which would be due to him as partner by proper proceedings against his partners and divide it between them in the proportion of their shares in the joint family property. If he refuses or neglects to do so their remedy is to treat the interest of the co-parcener in the firm as joint family assets and to sue for partition. In such a suit the assets can be realised by the appointment of a receiver who as representing the partner-co-parcener can by appropriate proceedings get in what may be due to him. It has been argued that this procedure will lead to a multiplicity of actions, but looking at the question from the mere standpoint of convenience I think it would be mischevous to hold that a co-parcener can interfere with the affairs of the partnership simply because he has on partition got a specific share in the interest of one of the partners and to treat him as a partner because of a partition with which the other partners have no concern. In cases of mere change of status which according to the recent decision of the Privy Council can be effected by a mere unilateral declaration of intention the position is still more complicated as it may well be that on the actual partition of the various items of joint family property the interest of the family in the business

1. (1918) I. L. R 36 M 185. 2. (1915) 30 M L. J. 241.

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may go to some other co-parcener. I do not think that any consideration of convenience to the members of a joint family should affect the settled rules of law as to the rights and obligations of partners *inter se.*

I am of opinion that the decision of Mr. Justice Spencer is right and would dismiss the Letters Patent Appeal with costs.

*The Chief Justice* :—I agree.

*Bakewell, J* :—I agree.

A. S. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Vengu Naidu and others ... *Petitioners** (*Claimants*).

*v.*

The Deputy Collector of Madura Division. ... *Respondent in all.* (*Land Acquisition Officer*).

Vengu Naidu *v* The Deputy Collector of Madura Division.

*Consolidation—Power of Appellate Court—Inherent power—Exercise of discretion in ordering consolidation—No request for consolidation in the lower Court—Whether consolidation can be ordered in the Appellate Court—Land Acquisition Act, Ss. 12, 18 and 20—A single notice under S. 12 (2) and a single objection by the claimant—Splitting up of the awards by the District Court—Right of claimant to treat them as a single award.*

An Appellate Court has the inherent power of consolidating appeals before it and the power under S. 151 of the Civil Procedure Code may be invoked for that purpose.

Courts should see whether a case is a fit one for consolidation, as if consolidation is allowed, the Crown will be deprived of the public revenues by the reduction in the Court-fees payable by the appellants.

Where only one notice was served on the claimants under S. 12 (2) of the Land Acquisition Act and there was only one objection by them, there would *prima facie* be a single award. The fact that in the arbitration proceedings before the District Court, the award was split up ought not to be allowed to prejudice the right of the appellants to treat the award as one and they would be equitably entitled to consolidation.

Where the splitting of the awards by the referring officer or by the Court may not have been known to the parties or where there was no occasion for the claimants to take any objection at the hearing in the lower Court, the claimants can treat the awards as one and appeal against them in one appeal.

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order for consolidation of O. P. Nos. 223, 225, 226 of 1915 and O. P. Nos. 200, 201, 226 of 1915 and O. P. Nos. 27, 197 to 199, 210, 212 to 219, 221 and 227 of 1915 respectively on the

* C. M. P. Nos. 2187 to 2189 of 1916. 19th September, 1916.

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file of the District Court, Madura, as single cases and the awards thereon as a single case and allow the claimants to file single appeals respectively against awards in O. P. Nos. 223, 225 and 226 of 1915, O. P. Nos. 200, 201 and 226 of 1915 and O. P. Nos. 27, 197 to 199, 210, 212 to 219, 221 and 227 of 1915 respectively on the file of the District Court of Madura.

*K. S. Jayarama Aiyar* for Petitioner.

*The Acting Government Pleader* (V. Ramesam) for Respondent.

The Court delivered the following

Phillips, J.

**Judgment**:—This is an application to consolidate the several appeals from awards passed by the District Judge of Madura on reference made to him by the Land Acquisition Officer under S. 18 of Act I of 1894. Several references appear to have been made to the District Judge, but they were all in connection with land taken up for the extension of Madura Town, except one with which we are not now concerned. The District Judge treated all the references as 47 separate petitions, and passed a separate award on each of these although they were all tried together and were disposed of in one judgment. It is not quite clear whether the Land Acquisition Officer divided up the references in this way, either of his own initiative or at the request of the District Judge or whether it was done by the District Judge himself.

The first question argued is whether this Court has power to consolidate appeals. No express power to do so is conferred by the legislature, but such power has been held to be inherent in the Court, and I think has rightly been so held. So long ago as 1871 the Calcutta High Court approved of the consolidation of two suits and their disposal by one decree. *Enayetolloh* v. *Radha Charu Roy* [1]. In *Kashi Prosad Singh* v. *The Secretary of State for India* [2] appeals from 44 references under the Land Acquisition Act were ordered to be consolidated. *In Fink* v. *The Secretary of State for India* [3], it was held that in that case it was too late to consolidate the appeals from references under the Land Acquisition Act, but the Court pointed out the inconveniences that arose from the failure to consolidate and remarked that the Judge and the Collector should have consolidated the references. In *In re Dorabji Cursetji* [4], Macleod. J., held that the Court had power to

1. (1871) 15 W. R. 395.
2. (1901) I. L R 29 C. 140.
3. (1907) I. L. R. 34 C. 599.
4. (1907) 10 Bom. L. R. 675.

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consolidate, and relied on *Fink* v. *The Secretary of State for India* [1]. Reference may also be made to *In the matter of the Falls of Ettriuk* [2] where the question is considered. There appears to be no decision of this Court on the point, and the only case at all analogous is that when two appellate decrees have been passed on appeal from one decree, the second appeals, are consolidated into one. (*Sanyasi Lingam* v. *Gavaramma* [3]), but the analogy is somewhat remote. Consolidation is allowed in England and consequently I agree with the Calcutta and Bombay High Courts that a Court has power to consolidate appeals and would, if necessary, invoke the provisions of S. 151 of the Code of Civil Procedure in support of the proposition.

The learned Government Pleader takes objection to consolidation only on the ground that if it is allowed the public revenues will be deprived of a portion of the court-fees payable by appellants. We have therefore to consider whether this is a fit case for consolidation. Although several plots of land were acquired from appellants, only one notice was served on them under S. 12 (2) of the Land Acquisition Act in respect of all the plots and under S. 18 of the Land Acquisition Act the appellants only made one application to the Collector to refer their objection to the award. Under S. 20 of the Land Acquisition Act the Court has to determine the objection, *i. e.*, the objection referred to in S. 18 (2). The fact that only one notice was sent under S. 12 and one objection filed under S. 18 would *prima facie* indicate that there was only one award the correctness of which had to be determined by the District Court. The fact that the award contained several items does not make it as many awards for there is no reason why one single award should not decide many questions referred for decision. So far therefore as appellants were concerned there was only one award which was referred under S. 18 for the decision of the District Court. The fact that in the arbitration proceedings before the District Court the award was split up and amalgamated with other awards, which had reference to other claimants, ought not to be allowed to prejudice the right of the appellants to treat their award as one, and they appear to be equitably entitled to consolidation.

A further objection is taken that the appeals cannot be allowed to be consolidated as there was no consolidation nor even a

1. (1907) I. L. R. 34 C. 599. 2. (1894) I. L. R. 22 C. 511.
3. (1906) 16 M. L. J. 411

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request for consolidation in the lower court, and reliance is placed on *Rakkal Chandra Tewari* v. *Manmatha Nath Mitter* [1] and *Janardan Kishore Lal* v. *Shib Pershad Ram* [2]. These are however appeals not from suits, but from arbitration proceedings. (*Vide The Secretary of State for India in Council* v. *Chelikani Rama Rao* [3]) and in the Lower Court there was no occasion for appellant to ask for consolidation. They had been furnished with only one award, to which they objected and consequently there was only their one objection to be disposed of, and it was disposed of, in conjunction with other objections at one hearing and by one order. The splitting up of the awards by the referring officer or by the Court may not even have been known to the parties, and in any case there was no occasion for the claimants to take any objection at the hearing, for all the cases were heard together. The splitting up of the awards, if made by the Land Acquisition officer, was apparently not communicated to the parties under S. 12 (2) of the Land Acquisition Act and consequently there was only one valid award, so far as the appellants are concerned and they are entitled to appeal against it in one appeal. The petition is therefore allowed with costs.

Civil Miscellaneous Petitions Nos. 2138 and 2139 follow the order in the Petition. The time allowed for the payment of the costs is three months from this date.

C. A. S.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD, AND MR. JUSTICE BAKEWELL.

P. R. Srinivasa Aiyar ... *Appellant** (*Plaintiff*)

*v.*

A. Sesha Aiyar and another ... *Respondents* (*Defendants.*)

Srinivasa Aiyar v. Sesha Aiyar

*Contract Act, Ss. 23, 65—Marriage brocage agreement—Sum of money paid under—Suit to recover—Whether lies and under what conditions.*

Money paid by one of the parties to a marriage brocage agreement to the other can be recovered before the whole or a substantial portion of the agreement is performed.

The right to recover a sum of money or anything else paid under an unlawful agreement does not depend upon whether the transfer of the advantage under it to the other party was merely ostensible or was intended to be real.

* L. P. A. 233 of 1916. † Feb. 28th and March 14th, 1917.

1. (1911) 15 C. W. N. 994.
2. (1915) I. L. R. 43 C. 95.
3. (1915) 31 M. L. J 324.

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The distinction under this head, drawn in *Ledu Coachman* v. *Hira Lal Singh* [1], between agreements contrary to law or public policy and others which would merely have an unlawful object is not warranted by S. 23 of the Contract the Act or by the English cases.

S 65 of the Contract Act would not apply to such a case, as the words "discovered to be void" in that section refer to an agreement which was void *ab initio* but not then known to the parties to be so, and do not refer to an agreement of which illegality must be taken to have been always known to the parties.

Where the plaintiff sues to recover a sum of money and he does not refer to the unlawfulness of the agreement under which it was paid, the defendant can rely on the unlawfulness of agreement as a defence only if he further alleges and proves that the unlawful agreement or a substantial part of it has been performed.

Per *Bakewell, J.*—In India, marriage is not generally a matter of contract between the parties thereto, but is a status or condition imposed upon them by persons who are under a social duty to do so. Those who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

Appeal under Cl. 15 of the Letters Patent against the order of Burn, J.

*Burn, J.*—delivered the following

**Judgment**:—The plaintiff in this case based his claim to the return of money on the fact that he was entitled to restitution because the contract, in pursuance of which the money was paid, was rescinded by the defendants. The finding of the Subordinate Judge is against this contention. On the facts he finds that the plaintiff was responsible for the breach. The plaintiff failed to establish the case with which he went into Court.

The plaintiff now seeks to set up a perfectly new ground of claim. He wishes to rely on the fact that the contract was void under S. 23 of the Indian Contract Act, IX of 1872, and that he is entitled to restoration of the money, which the defendants have received, under S. 65 of the Indian Contract Act. I do not think that the plaintiff should be allowed to raise this question now. The defendants relied upon this as a ground of defence but the plaintiff cannot for this reason adopt this as a fresh ground of attack.

In this view, it is unnecessary to refer in detail to the decisions which have been quoted in support of the plaintiff's present claim. I may say, however, that there is no authority for holding that S. 65 of the Indian Contract Act has no application to a payment of the kind now in question, which, according to the plaintiff's present contention, was made in pursuance of a contract known by him to be *void ab initio* ou the ground of its being

1. (1915) I. L. R. 43 Cal. 115.

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immoral and contrary to public policy. *Ledu Coachman* v. *Hiralal Singh* [1], *Nathu Khan* v. *Sewak Koeri* [2] and *Girdhari Singh* v. *Neeladhar Singh* [3]. The petition is dismissed with costs.

*Dr. Pandalai* for the Appellant.

*T. R. Venkatarama Sastri* for the Respondents.

The Court delivered the following

Oldfield, J.

**Judgments** :—*Oldfield, J* :—Plaintiff, here appellant, sued defendants for Rs. 400 alleged to have been advanced to them out of Rs. 1,100, payable under an agreement as consideration for the marriage of his minor sister with Raman, the first defendant's son and the second defendant's brother. There were three defences: that (1) there was no cause of action, because the first defendant entered into the agreement only on behalf of Raman and the second defendant was not a party to it at all, (2) the agreement was not broken by defendants, (3) it was invalid, as being against public policy, and the money advanced under it was therefore irrecoverable.

Of these defences, the first was not dealt with either at the trial or by the learned Judge in this Court, though one would have supposed that a decision regarding the existence of a cause of action would have been reached, before enquiry began into the validity of the agreement set up as constituting it or the responsibility for breaking that agreement. It is said that the plea was abandoned. But the trial was under Small Cause Procedure and no issues were framed. Raman was according to plaintiffs' second witness and first defendant of age at the date of the agreement. The latter said that he took away the Rs. 400 paid under it. It is not the case that no evidence to support defendant's pleas was adduced; and it was admitted before us that they were relied on in this Court, although the learned Judge did not mention them. It is not possible in these circumstances to hold that they were abandoned or that defendants cannot support the learned Judge's decision with reference to them, if they can be established and if it is not sustainable on other grounds.

The learned Subordinate Judge's finding on the second defence, that plaintiff, not defendants, broke the agreement is one of fact and must be accepted. It is, however, to be observed that

1. (1915) I. L. R. 43 C. 115. 2. (1911) 15 C. W. N. 408.
3. (1912) 10 A. L. J. 159.

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coupled as it was with a plea that the agreement was unlawful and therefore unenforceable, it could justify no legal conclusion. For the plea, in effect that defendants were absolved by plaintiff's refusal to perform his part from any duty under the agreement was irreconcilable with the contention that such performance would have been in conflict with public policy. Shortly they could not complain of plaintiff's refusal to do what they alleged would have been wrong.

On the remaining question raised there is no doubt that the agreement was unlawful and therefore void. As set up in the plaint, it involved no suggestion that the money to be paid was for settlement on the bride or her issue or was anything but remuneration to defendants for bringing about the marriage; and, as plaintiff's grounds Nos. 5 and 6 and first defendant's written statement (paragraph 8) and the second defendant's paragraph 13 show, both sides are agreed that such an agreement would be unlawful. *Venkatakrishnayya* v. *Lakshminarayana* [1] and *Devarayan* v. *Muthuraman* [2]. The question is then whether the plaintiff is entitled to recover what he paid under such an agreement and whether the defendants can retain an advantage received under it. This question was not raised in the plaint, the Subordinate Judge refusing to deal with defendant's allegation that the agreement was unlawful, because he had found in their favour as to responsibility for its breach. On this account the learned Judge held that plaintiff could not raise that contention here, also expressing the opinion that his claim was unsustainable with reference to S. 65 of the Indian Contract Act. That section however, is not applicable; *Dayabhai Tribhovandas* v. *Lakshmichand Panachand* [3], *Gulabchand* v. *Fulbai* [4] and *Ledu Coachman* v. *Hiralal* [5]. The Indian Contract Act affording no direct guidance, the conclusions of the learned Judge must be tested with reference to authority.

He has supported his conclusion against the existence of any right to recover what has passed in connection with an unlawful agreement by citation of three cases. But in one of them, *Girdhari Singh* v. *Neeladhar Singh*, [6] it was conceded that, if the contract was contrary to public policy, the plaintiff was not entitled to recover; and the case is therefore no authority against the contention,

1. (1908) I. L. R. 32 M. 185.
2. (1912) I. L. R. 37 M. 398.
3. (1885) I. L. R. 9 B. 358.
4. (1909) I. L. R. 33 B. 411.
5. (1915) I. L. R. 43 C 115.
6. (1912) 10 A. L. J. 159.

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advanced before us, that the general rule is subject to an exception in plaintiff's favour when no portion or when no substantial portion of the unlawful purpose has been carried out. So also the next case, *Nathu Khan* v. *Sewak Koer* [1], since it was one of completed performance. The third case *Ledu Coachman* v. *Hiralal* [5] cannot be dismissed so shortly, since it directly negatives the contention just referred to by the statement.

"It is plain that, although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed, if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law, or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered or money paid on it."

The distinction drawn would appear to be between agreements contrary to law or public policy and others, which would merely have an unlawful object and would also therefore be void under S. 23 of the Indian Contract Act. But there is no warrant for it in that section, since all alike are made unlawful or (with all respect) in the cases referred to by the learned Judges, who moreover take no account of other cases, in which the exception was applied without reference to the distinction proposed.

Of the cases referred to by them, *Taylor* v. *Chestor* [2], was a case of completed performance and *Howson* v. *Hancock* [3], one of a claim to recover money paid on a wager, in which no further performance was possible. *Tappendon* v. *Randall* [4] is relied on only for a *dictum* which apparently has not affected later decisions. So also the learned Judge's quotation from *Collins* v. *Blantern* [5] though it is reproduced in *Kearley* v. *Thomson* [6] and *Barclay* v. *Pearson* [7] to be referred to later. Of the Indian cases cited, *Bai Vijli* v. *Nansa Nagar* [8] is not of importance, since this point and the authorities regarding it were not considered. The learned Judges' reason for rejecting two decisions in the opposite sense, *Bakshi Das* v. *Nadu Das* [9] and *Gulabchand*

1. (1911) 15 C. W. N. 408.
2. (1869) L. R. 4 Q. B. 309.
3. (1800) 8 T. R. 575.
4. (1801) 2 Bos and p. 467.
5. (1765) 2 Wilson 341.
6. (1890) 24 Q. B. D. 742.
7. (1893) 2 Ch. 154.
8. (1886) I. L. R. 10 B. 152.
9. (1905) 1 C. L. J. 261.

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v. *Fulbai* 1 that they relate to marriage brocage contracts, is in any case not available to us in the present connection.

On the other hand the exception to the general rule, based on the absence of any or of any substantial performance is clearly recognised without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, *Taylor* v. *Bowers* 2, in which the object of the agreement, a fraud on creditors would, if persisted in, have resulted in the frustration of the Insolvency law. Distrust of the decision in *Taylor* v. *Bowers* 2 was no doubt expressed in *Kearley* v. *Thomson* 3 but not on the ground that it overlooked the distinction drawn by the learned Judges, which was not in fact referred to, although the object of the agreement was described as to defeat justice. The principle of *Taylor* v. *Bowers* 2 was moreover adopted fully in *Barclay* v. *Pearson* 4 already referred to, though the agreement related to what was regarded as a lottery, the opinion being expressed that those who had paid money under it, could recover. Of the Indian cases, those must be distinguished, in which the title sued on could be established only on the foundation of the validity of the unlawful agreement as for instance in *Yeramati Krishnayya* v. *Chundru Papayya* 5. In benami cases however, for example, *Banke Behari Das* v. *Raj Kumar Das* 6 and *Govinda Kuar* v. *Lala Kishun Prasad* 7, the decision has always turned not on the extent to which the agreement, if it were performed, would conflict with law or public policy, but on whether it was performed and the unlawful purpose was affected wholly or substantially or not. The decision of the Privy Council in *Pether Perumal Chetty* v. *Muniandi Servai* 8 may in particular be mentioned firstly because it refers to the weight of the decision in *Taylor* v. *Bowers* 2 as unimpaired by *Kearley* v. *Thomson* 3 and secondly because the contention that there had been a fraudulent arrangement to defeat creditors and a step taken to carry it out, "which would on the trial of an indictment for conspiracy have amounted to a good overt act of conspiracy", was brushed aside as irrelevant and the effecting of the contemplated fraud alone was regarded as material. Authority standing thus, it is (with all due deference, not possible

1. (1909) I. L R. 33 B 411.
2. (1876) 1 Q. B. D. 291.
3. (1890) 24 Q. B. D. 742.
4. (1893) 2 Ch. 154.
5. (1897) I. L. R. 20 M 326 at 329.
6. (1907) I. L. R. 27 C. 231.
7. (1901) I. L. R. 28 C. 370.
8. (1908) I. L. R. 35 C. 551.

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to follow the decision in *Ledu Coachman* v. *Hira Lal Bose* [1] or to confirm the decision, which is under appeal.

It is however argued by Mr. T. R. Venkatarama Sastri for defendants firstly that the exception above referred to the general rule depends, not on whether there has been performance of the unlawful agreement but on whether the transfer of an advantage under it was merely ostensible or was intended to be real, recovery of the advantage being allowed only in the former class of cases. That is not the test recognised in the authorities already referred to or in *In re Great Berlin Steamboat Company* [2] in which the transfer was treated as irrevocable though it was clearly ostensible. It is then urged with reference to *Kearley* v. *Thomson* [2], that plaintiff cannot recover, because though the whole of the unlawful agreement has not been performed a substantial portion has been; and on the view already expressed a remand on this point may no doubt be fairly claimed.

The last question raised is whether plaintiff can rely on defendant's admission that the agreement was unlawful either generally or when as in this case, he did not refer to its unlawfulness in his plaint. The answer however to the question in both forms is the same, that in the words of Mellish, L. J., in *Taylor* v. *Bowers* [3] plaintiff does not "as the rule is laid down in *Simpson* v. *Bloss* [4], require any aid from the illegal transaction to establish his case. He is not bringing the action for the purpose of enforcing the illegal transaction—

"To hold that plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before it was determined on." Or, as the point was put by James, L. J., "It is the defendant who has really got to show the fraud" the element vitiating the agreement in the case under consideration.

"It is the defendant who has got to make out his title to the goods from the transaction, which is a fraud and which it seems he was a party to and there would be no title in defendant independently of that."

To adapt these principles to the present case, the plea, that the agreement is unlawful is not plaintiffs' but defendants.' Defendants, as already pointed out, cannot, relying on it, also complain

1. (1915) I. L. R. 43 C. 115.
2. (1884) 26 Ch D. 616.
3. (1876) 1 Q. B. D. 291.
4. (1816) 7 Taunt 246.

of plaintiff's default. They can (and this is the point at present material) rely on it, only if they further allege and prove that the unlawful agreement or a substantial part of it has been performed. On this point their written statements contained nothing; and it was, therefore, not plaintiff's but their pleading, which was defective. If the subordinate judge had considered the unlawfulness of the contract, plaintiff would (for all that appears) have pointed this out. The contention on this side is one purely of law, and in the circumstances there is no adequate reason for depriving him of the benefit of it.

Defendants have further proposed to support the lower Court's judgment with reference to the counter claim made in their written statements to damages on account of loss of reputation. It has not however been shown how this claim can be sustainable as arising out of the breach of an admittedly unlawful agreement or how it can be reconcilable with defendant's denial, that they were parties to that agreement. The questions for consideration are therefore only:—(1) Whether the plaint agreement was entered into with defendants or either of them or with Raman with or without first defendant as his agent. (2) Whether, with reference to the authorities above referred to, the agreement or a substantial part of it was performed?

The Letters Patent Appeal must be allowed and the Subordinate Judge's decision set aside with a direction to restore the Small Cause suit to file and rehear it, admitting any additional evidence tendered in the light of the foregoing. Costs to date in both Courts will be costs in the cause and will be provided for in the decree to be passed.

*Bakewell, J.*:—In India marriage is not generally a matter of contract between the parties thereto but is a status or condition imposed upon them by persons who are under a social duty to do so. The authorities which have been cited support, I think, the proposition that they who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

The pleadings in this case are not clear but I think that the plaint alleges an arrangement between the parties that a marriage portion should be paid out of the estate of the deceased father of the prospective bride and that certain jewels should be presented to her by the relations of the prospective bridegroom; and, apart

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from other averments in the written statement of the first defendant it might be inferred that his case was that the marriage portion was to be paid to the bridegroom, the sum of Rs. 400 now claimed, being portion thereof, had been in fact paid to him and that the defendants gained no benefit from this payment because the bridegroom had been adopted into another family. I fail to see anything contrary to public policy or morality in an agreement between third parties which is intended solely for the benefit of the married couple or either of them. Having regard, however, to the defendant's admission that the agreement was illegal and that they had some interest in the sum now claimed, I do not think that it is open to the defendants at this stage to maintain that the agreement was valid.

The words 'discovered to be void' in S. 65 of the Contract Act are more apt to describe an agreement which was void *ab initio* but not then known by the parties to be so, than an agreement of which the illegality must be taken to have been always known to them, and I agree that in this case it is safer to rely upon the authorities cited by my learned brother. These authorities show, I think, that in a suit for money had and received to the use of the plaintiff, the defendant may plead that it has been applied in accordance with their agreement and the plaintiff cannot reply that the agreement was illegal because he is *particeps criminis*. If the agreement is still wholly executory and no material part of the illegal purpose has been accomplished, the defendant cannot plead that he holds the money for that purpose. (See *Barclay* v. *Pearson* [1], *Pether Perumal Chetty* v. *Muniandy Servai* [2] and the cases there cited). These propositions apply when the parties are in *pari delicto* and to agreements void under Civil Law different considerations may arise in the case of an agreement to commit an offence against the Crown, I agree to the order proposed by my learned brother.

C. A. S.

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1. (1893) 2 Ch. 154.
2. (1908) I. L. R. 35 C. 551.

## PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART. AND SIR LAWRENCE JENKINS.

Anant Ram and others ... *Plaintiffs,* Appellants.*

*v.*

The Collector of Etah and others ... *Defendants, Respondents.*

P. C.
Anant Ram
*v.*
The
Collector of
Etah.

*Hindu Law—Mitakshara—Mortgage of joint property by manager who is not the father—Burden of proving necessity—Whether a mortgage without necessity binds mortgagor's own share.*

The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage.

*Narain Prasad* v. *Sarnam Singh* [1] followed.

When the mortgage is for a larger amount than the necesstiy warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a joint family, mortgaged three joint villages for Rs. 8000 to pay the Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance.

*Held*, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound.

Appeal from a decree of the Allahabad High Court, dated May 11, 1911, varying a decree of the Subordinate Judge of Aligarh.

The facts of the case are sufficiently set out in their Lordship's judgment.

*Dube*, for appellants, submitted that the lender in these cases is not bound to see to the application of the money. Here proper enquiry was made by the lender as to the existence of legal necessity. The recital of such necessity in the mortgage deed is sufficient. *Banga Chundra Dhur Bisvas* v. *Jagat Kishore Chowdhuri* [2].

* 29th October 1917.

1. (1917) L. R. 44 I. A. 163=33 M. L. J. 39=39 All. 500.
2. (1916) L. R. 43 I. A. 249, 252.

P. C.

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[*Sir W. Phillimore*:—All that case decided was what was evidence of necessity, not that enquiry would supply the absence of necessity.]

My case is that the whole of the Rs. 3000 was wanted for revenue.

[*Sir W. Phillimore*:—You have not shown that the balance over and above 1,698 was even due.]

My case is that a representation was made that the money was due for Government revenue, and on that representation we acted.

The respondents did not appear.

Their Lordships' judgment was delivered by

Lord Buckmaster.

*Lord Buckmaster.*—The question raised in this appeal is as to the rights of certain mortgagees under and in respect of a mortgage which was dated the 4th September 1894. That mortgage was executed by one Raja Sheoraj Singh, the manager of certain joint property held by himself and his brother, Maharaj Singh, and governed by the Mitakshara law. The mortgage was for the sum of 3,000 rupees, with interest at the rate of 1 rupee 2 annas per cent. per month, with compound interest and half-yearly rests. The mortgage affects three villages, and on the face of it there is a recital that the money was lent in order that the mortgagor might pay the Government revenue. The original mortgagee is dead, and his representatives instituted the proceedings out of which this appeal has arisen for the purpose of enforcing their rights under the mortgage deed. A considerable number of defences were raised by the different parties who were made defendants to those proceedings, but for the purpose of the present appeal only one of those defences needs consideration. That defence is this: that the property that was mortgaged being joint property, a mortgage could only be operative to the extent to which the mortgage-money was needed for the necessities of the joint estate. The learned Judge before whom the case was heard allowed the whole of the original mortgage debt to stand but reduced the rate of interest. The High Court, to whom an appeal was brought, has allowed the mortgage for part only of the original sum, namely, for the sum of 1,698 rupees 5 annas, and has restored the full rights of interest which the mortgagee possessed under the deed on that sum.

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Lord Buckmaster.

The appeal from that judgment has been brought under an order made by the High Court, who thought that the appeal gave rise to two questions of importance, the first being, "Whether the burden lies upon a mortgagee who takes a mortgage from the manager of a joint Hindu family governed by the Mitakshara law to prove that the debt was incurred for family necessity"; and the second; "Whether, if the debt was not so incurred, the interest of the manager of the family, that is, of the mortgagor, in the mortgaged property could be sold in enforcement of the mortgage." It is to be observed that the grounds upon which the appeal was permitted do not include the question of considering whether, in point of fact, more than the amount allowed by the High Court had in fact been raised by way of necessity; but this point has been argued and considered by their Lordships.

As to the first of these two questions their Lordships entertain no doubt. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith (S. 38, Transfer of Property Act.) In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made, for example, by a widow who has only a similar limited power of disposition. In the case of *Banga Chāndra Dhur Biswas* v. *Jagat Kishore Chowdhuri* [1], following previous decisions to the same effect, it was stated in perfectly clear and unambiguous terms that the burden of proving that such dispositions were lawful rests upon the persons who seek to claim benefits under them. The question, therefore, which the High Court thought needed consideration, so far as the burden of proof is concerned, must be decided against the appellants.

As to the second point, that question, so far as it covers mortgages in the same province as the province from which

1. (1916) L. R. 43 I. A. 249=31 M. L. J. 568.

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Lord Buckmaster.

this appeal has been brought, has also been decided since the judgment of the High Court, adverse to the appellants' contention in a case to which their Lordships' attention was called—*Narain Prasad* v. *Sarnam Singh* [1].

There remains only the point as to whether in this case the High Court were right in thinking that the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent of the 1,698 rupees. Now the facts with regard to that matter are these: There were three villages that were the subject of the mortgage. The statement in the deed was that the money was needed to pay the Government revenue. What payments were made in respect of that revenue could easily be established by calling the proper witnesses, and, indeed, one such witness was called for the purpose of proving payments in respect of two of the villages, and he showed payments to the amount for which the High Court has allowed the mortgage to stand. The mortgagee cannot allege that the witnesses who could prove the necessity, on the existence of which his security depends, are inaccessible, or cannot now be obtained through lapse of time or for other good reason. The proof could have been and ought to have been laid before the Court by the appellants, on whom the burden rests. That burden they have failed to discharge and in their Lordships' opinion the High Court was perfectly right in deciding that the security stood to the limited extent only of the necessity proved. They will therefore humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant:—*Barrow Rogers and Nevill.*

A. P. P.

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1. (1917) L. R. 44 I. A. 163.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

R. S. Rama Shenoi and another ... *Appellants** (*Plaintiffs*).

*v.*

M. A. Hallagna and another ... *Respondents* (*Defendants*).

Rama Shenoi *v.* Hallagna.

*Civil Procedure Code—O. 21 R. 63—Suit by unsuccessful claimant—Onus of proof—Decree executed one of foreign Court—Effect—Foreign judgment—Validity—Judgment based on wrong view of law—Judgment opposed to "natural justice"—What is.*

Where, in execution of a decree passed by the Cochin Court against a person described as the manager of a joint Hindu family and transferred to the British Court under S. 44 of the Code of Civil Procedure, property of the alleged joint family was attached, and a claim preferred to the same by the younger brother of the judgment-debtor on the ground amongst others, that even before the Cochin suit, he and his brother (the judgment-debtor) had become divided, was rejected, *held*, in a suit brought by the unsuccessful claimant under O. 21 R. 63 of the Code to establish his right, that the onus was on him of proving the division set up by him.

A wrong view as to onus will not have the effect of rendering a foreign judgment one not given on the merits.

A mere incorrect view of law by a foreign Court will not give jurisdiction to our Courts to say that its judgment is opposed to natural justice.

Meaning of term "natural justice" when used in reference to foreign judgments.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 528 of 1914 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Cochin in O. S. No. 3 of 1913.

Appeal under clause 15 of the Letters Patent preferred against the decision of the Hon'ble Mr. Justice Ayling in S. A. No. 999 of 1914 preferred against the decree of the District Court of South Malabar in A. S. No. 144 of 1914 preferred against the decree of the Court of the Subordinate Judge of Cochin in O. S. No. 7 of 1911.

*Dr. K. Pandalai* and *C. V. Ananthakrishna Aiyar* for Appellants.

*C. Madhavan Nair* for Respondents.

The Court delivered the following

**Judgment**:—A decree was obtained against the elder brother of the plaintiff in the Cochin Court. In the cause title, he was

* S. A. No. 2181 of 1915 and L. P. A. No. 56 of 1915. 20th March, 1917.

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described as the manager of the joint family. Apparently the plaint alleged that the family property was liable for the claim as the debt was contracted for family purposes. The defendant in the Cochin Court pleaded that no decree should be passed against him as manager. Therefore issue 7 was framed. The Cochin Judge held that the burden of proving that the defendant was not the manager and that the debt was not binding on the family lay upon him; and passed a decree against him personally and against the family properties. The decree was executed against the Cochin properties and then transferred to the British Court under S. 44 of the Code of Civil Procedure. In our Court, a claim was preferred by the plaintiff against the attached properties on two grounds:—(a) that the defendant in the Cochin suit had become divided from the plaintiff before suit and (b) that the decree was otherwise not executable against the properties in the possession of the plaintiff. The claim was rejected. The plaintiff has brought this suit to establish his right. The Courts below have dismissed the suit. Hence this second appeal.

Dr. Pandalai for one of the brothers, the appellant in Second Appeal No. 2181 of 1915, contended that it was the duty of the Courts below to have decided whether there was a division prior to the Cochin suit and whether the brother who was sued in that Court was the manager. It is clear under R. 63, O. 21 that the burden of proof is on the plaintiff to establish his claim. Beyond stating that he was divided, he has asked for no issue; and has adduced no evidence on the question of division or managership; the plaintiff is not therefore entitled to ask us to send the case down for a finding on that question.

The learned counsel further contended that as the Cochin Court was wrong on the question of the burden of proof, the judgment must be deemed not to have been given on the merits. We are unable to accept this contention. In the Cochin Court, the general law administered relates to Marumakkathayam Tarwads; and as in a suit against the Karnavan as such the decree would be binding on the Anandravans, unless the latter could show that the Karnavan was not acting on behalf of the Tarwad, the idea seems to have gained ground that in the case of suits against managers of Marumakkathayam families the onus is on the other members to show that the debt is not binding on them. This is not the law as it obtains in British India. It is for the creditor to prove

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that the debt is recoverable against the members of the family; we may, therefore, take it that the Cochin Court was not right in its view of Hindu Law. Does that render the judgment one not given on the merits? We have not before us all the materials on which the Cochin judgment was based. Consequently, we are unable to hold that the decision was not on the merits. The decision of the Judicial Committee in *Keymer* v. *Visvanadha Reddy* [1], has no bearing on the present case. There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits.

Mr. Ananthakrishna Aiyar who appeared for another brother the appellant in the connected appeal raised a more serious contention: He argued that as the Cochin Court was manifestly wrong on a point of Hindu Law, the judgment was contrary to natural justice. In this connection, we notice that the language of cl. (d) of S. 13 has undergone change. In the old Code, the words were "if it is in the opinion of the Court before which it is produced contrary to natural justice". The present language in S. 13 (d) is "where the proceedings in which the judgment was obtained are opposed to natural justice." This change carries out the view of Bramwell, B in *Crawley* v. *Isaacs* [2]. The learned Baron there said: "I think the term 'natural justice' which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case." (Page 531). Consequently the mere fact that a judgment is wrong in law is not enough. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. That cannot be said of the present case. Further as pointed out by Lord Chelmsford in *Liverpool Marine Credit Co.* v. *Hunter* [3], a mere incorrect view of law by a foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice. See also per Cockburn, C.J., in *Imrie* v. *Castrique* [4], and *Scott* v. *Pilkington* [5]. Mr. Ananthakrishna Aiyar drew our attention to *Messina* v. *Petrocochino* [6]. In that case it was pointed out that unless there was a manifest error or fraud in the proceedings of the judgment, the British Court should give effect to it. A wrong view as to onus does not render a judgment erroneous on the face of it. Moreover having

1. (1916) I L. R. 40 M. 112=32 M. L J. 35 (P C.)
2. (1867) 16 L. T. (N. S.) 529. 3. (1868) L. R. 3 Ch. A 479.
4. (1860) 8 C. B. (N S) 405=141 E. R. 1232.
5. (1862) 2 B. & S. 11=121 E. R. 978. 6. (1872) L. R. 4 P C. (A. C.) 144

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regard to *Liverpool Marine Credit Co.* v. *Hunter* [1], we are unable to hold that a mistake as to law which is all that can be alleged against the decision in the present case, would be sufficient to vacate a foreign judgment. For these reasons, we think the decision of the Courts below is right and we dismiss the second appeal with costs. The Letters Patent Appeal follows.

A. S. V.

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## PRIVY COUNCIL.

PRESENT :—LORD PARKER OF WADDINGTON, LORD WRENBURY, SIR JOHN EDGE, MR. AMEER ALI, AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Amrit Narain Singh ... *Plaintiff* * (*Appellant.*)

*v.*

Gaya Singh and others ... *Defendants* (*Respondents*).

P. C. Amrit Narain Singh v. Gaya Singh.

*Hindu Law-Right of a reversioner to property held by a female owner—a mere* spes successionis—*Not assignable or transferable—not capable of being dealt with by the guardian of a minor.*

A Hindu reversioner has no right or interest *in praesenti* in the property which a female owner holds for her life, until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise ; until then it is mere *spes successionis.* His guardian, if he happens to be a minor cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

Appeal from a judgment and decree of the Calcutta High Court, dated 16th July 1913, reversing a decree of the Subordinate Judge of Patna, dated the 20th January 1909. One Jhamman Singh died leaving a widow, Radha Koer, a daughter Kar Koer and Amrit Narayan, the daughter's son, then a minor. The widow applied for mutation, but her application was opposed by the defendants, who were collateral relations of the deceased. Radha Koer's name was registered but she died in 1864. Disputes as to succession again arose, and Kar Koer and her husband Rajender Singh, father and guardian of the minor Amrit Narayan Singh, on the one side, and the defendants on the other executed an agreement to refer the matter to arbitration. But before the arbitrators could decide anything, the parties entered into a com-

* October 1917.

1. (1868) L. R. 3 Ch. A. 479.

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promise, which was placed before the arbitrators, and they were invited to make and did in fact make an award in accordance with the compromise. Under the compromise the properties in suit were awarded to the defendants. On the death of Kar Koer in 1905 the appellant Amrit Narayan brought the present suit to recover possession of these properties from the defendants. The Subordinate Judge found all the material issues in his favour and decreed the suit. The Subordinate Judge found that the plaintiff was not a party to the arbitration proceedings, that his father was not appointed his guardian under the provisions of Act XL of 1858, that the compromise and award were nullities and that the judgments of the District Judge and the High Court by which the award was made a decree of Court were not binding on the appellant. The defendants appealed to the High Court, which allowed the appeal and dismissed the suit.

*De Gruyther*, *K. C.*, and *B. Dube* for the Appellant :—Jhamman Singh was admittedly separate and the Appellant was therefore entitled to inherit his estate. The suit was well within time under Art. 141 of the Limitation Act, 1877. Art. 95 of that Act does not apply. Plaintiff's claim was not barred by the proceedings in arbitration taken by his mother and father. There was really no arbitration. The award was based on the compromise which Kar Koer and Rajender Singh made. The appellant was not a party to the compromise and the same was made against his interest. The plaintiff did not possess any interest whatever in Jhamman Singh's estate during the lifetime of his mother. His right was merely *spes successionis*, and was not transferable. In any case the Civil Courts which dealt with the award did not adjudicate upon the reversionary right of the plaintiff and the award was made a decree of Court against Kar Koer alone. Further S. 3, Act XL of 1858 was intended for the protection of minors, but Rajender Singh was not appointed guardian of the minor. Reference was made to the following :—*Sham Sunder Lal* v. *Achhan Kunwar* [1], *Mussammat Bibi Walian* v. *Banke Behari Pershad Singh* [2], *Nagendra Chandra Mittra* v. *Kishen Chandra Das* [3].

*A. M. Dunne, K. C.* for the respondents :—The Plaintiff's mother represented the whole estate and the proceedings by

1. (1898) L. R. 25 I. A. 18. 2. (1903) L. R 30 I. A. 182=30 C. 1021.
3. (1875) 19 W. R. 13.

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which she sought to set aside the award were properly heard and decided and she failed. It was therefore a good judgment and was binding on the reversioners who succeeded the widow, *Katama Natchiar* v *Srimut Mootu Vijaya* [1].

Further, the arbitrators decided the dispute by holding that the plaintiff and his mother had no interest according to the religious customs and usage of the parties. The minor was a party to the arbitration and the award was binding on him.

No reply was called for.

Their Lordships' judgment was delivered (22nd November, 1917) by

Mr. Ameer Ali.

*Mr. Ameer Ali:*—This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu law. Kar Koer died in 1905, and this action was brought in 1908. The suit is therefore clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent; they claimed the property both under the general Hindu Law as also under some undefined family custom. Their objections were overruled by the Revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajender Singh. There is nothing, however, on the record to

1. (1863) 9 M. I. A. 539 at 604.

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show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, a compromise was arrived at, in which also Rajender purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immoveable property of her father, receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the Civil Court under the provisions of S. 327 of Act X of 1859 (the law that regulated at the time the procedure of the Civil Courts in India) for a decree on the award. The Court of First Instance held that all the proceedings in connecton with the compromise and the award had been without Kar Koer's knowledge. It accordingly dismissed the application of the agnates under S. 327.

They appealed to the District Judge, who apparently considered that as Rajender, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under S. 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865, their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

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It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the Courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer; that in any event he was not bound by them. The defendants, on the other hand, among other pleas urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape the case took on appeal to the High Court. The Trial Judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamman at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the Civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamman was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turned solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned Judges state thus the questions they had to determine, viz.—

"(1). Whether Rajander Singh had power to refer the matter on behalf of his minor son to arbitration; (2) whether the plaintiff was properly represented in the proceedings in the Civil Court under S. 327 of Act VIII of 1859; and (3) and if he was, whether he can now treat the decree, which was based on the award, as a nullity, *and* claim possession of these properties at this distance of time."

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After answering the first two questions in the affirmative, the learned Judges decided the third against the plaintiff, and reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment. With respect, in proceeding to consider whether Rajander Sing, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu Law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake; a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis.* His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajander's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned Judges seem also to have lost sight of the fact that the award actually made was based on the compromise; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the learned Judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajander could represent his son under the proceedings under S. 327 of Act VIII of 1859 without a certificate under S. 3 of Act XL of 1858 on which their Lordships desire to express no opinion, it is abundantly clear that the Civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration, and that she had similarly consented to the compromise, and was

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therefore bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the *dictum* of the Judicial Committee in the well-known *Shivagunga Case*,[1] where, dealing with the question under what circumstances a decree against the widow may bind the reversioners, the Board expressed itself thus:—

"that unless it could be shown that there had not been a fair trial of the right in that suit or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which and which alone a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

Solicitors for Appellant:—*Watkins and Hunter.*

Solicitors for Respondents:—*Barrow, Rogers and Nevill.*

A. P. P.

1. (1863) *Katama Nachiar* v. *Srimut Raja Mooloo Vijaya* 9 M.I. A 539.

## PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE BART AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Bombay.]

Bhagwandas Parasram ... *Appellant**

*v.*

Burjorji Rutlonji Bomanji ... *Respondent.*

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Bhagwandas Parasram *v.* Burjorji Rutlonji Bomanji.

*Wagering contracts—Common intention to wager essential—Speculation not equivalent to wagering—Indian Contract Act (Act 1 of 1872) S. 30—Bombay Act III of 1865, Ss. 1, 2—Pakka Adatias—Their Position*

Speculation does not necessarily involve a contract by way of wager: to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for.

Appeal from a decree of the Bombay High Court, dated March 28, 1913, reversing a decree of Beaman, J.

The facts appear from their Lordships' judgment and from the reports in 37 Bom. 347 and 38 Bom. 204.

*Sir W. Garth* for Appellant.

Respondent did not appear.

*Sir W. Garth* for Appellant: The Appellate Court have erred in holding that the contracts sued on are wagering contracts. This Board have held that the law as to wagers formerly in force in India has been superseded by S. 30 of the Indian Contract Act, which in Bombay is supplemented by Bombay Act III of 1865, Ss. 1 & 2. The appellant firm were *pucka adatias.* A *pucka adatia* can accept the contract himself, or he can pass it on: in either case he guarantees the price and gets a commission. What the *pucka adatia* does with the contract does not concern the principal at all. As to the custom of *pucki adat,* I would refer to *Bhagvandas Narotamdas* v. *Kanji Deoji* [1] the authority of which has been accepted by both the lower Courts.

The Appellate Court, though not suggesting that we ourselves could win or lose by the rise or fall of the market, have held that we were gambling ourselves with reference to the sub-contracts into which we entered. The only points they rely on are (1) a conversation with our *gomasta* who is reported to have said that 300 tons of linseed were bought by us "for Court

* 26th and 29th October, 1917.

1. (1905) I. L. R. 30 Bom. 205, 210, 215.

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purposes". Our representative was not even cross-examined as to this; (2) the fact that in all the sub-contracts delivery to a particular Marwari firm was barred. This, the High Court say, was because that firm might require delivery, but of this there is no proof. These points were not raised in the pleadings. The onus of proof on these two matters is on defendant-respondent, and he has altogether failed to discharge it.

[*Lord Buckmaster*:—The central point in the case is, was there or was there not a stipulation, a term in the contract, express or implied, by which you were never to ask for delivery?]

Appellants here were mere Commission Agents, entitled to remuneration and reimbursement of expenses, but they took no risks. It is the essence of a wager that each side should stand to win or lose according to the result of the event as to which a risk is taken:—*Sassoon* v. *Takersey Jadhawjee* [1].

Their Lordships' judgment was delivered (November 26, 1917) by

Sir Lawrence Jenkins.

*Sir Lawrence Jenkins*:—This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed, and the third was in these terms:—

"Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiffs were not aware of the defendant's intention to deal in differences only?"

The Trial Judge, sitting on the original side of the High Court at Bombay, found all the issues in the plaintiffs' favour, and passed a decree for the amount claimed.

On appeal the appellate bench of the High Court agreed with the findings of the Trial Judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit.

It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as *Pakka Adatias*. The defendant, on the other hand, was a young man

1. (1904) I. L. R. 28 B. 616, 624, and 625.

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without any regular business, who with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market.

In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery.

On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as *Pakka Adatias*, and, to secure them against loss, sums amounting in the aggregate to 61,000 rupees, were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorise them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross contracts, and paying differences as to the balance of linseed. The result was, that after giving the defendant credit for the 61,000 rupees deposited as margin money, and a sum of Rs. 5,804 : 2 : 3 due to him on another account, there was due to the plaintiffs Rs. 90,763 : 14 : 6, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable, it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the Courts on the footing that the plaintiffs were employed by the defendant, and acted as *Pakka Adatias*, and the description in *Bhagwandas* v. *Kanji* [1], of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an up-country constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers.

And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the

1. (1905) I. L. R. 30 Bom. 205.

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defendant, against the consequences of the acts done by them unless those acts were unlawful. There is no suggestion that the acts of the *Pakka Adatia* as such are lawful; on the contrary, *Pakki Adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a *Pakka Adatia*, as that of anyone else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description?

It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term, of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery, and that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

No such intention has been proved.

Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as *Pakka Adatias* of the defendant the rise or fall of the market was matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment.

The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims cannot alone vitiate the transactions.

The learned Judges in appeal were evidently impressed by the statement ascribed to the plaintiff's *munim* that the delivery of 300 tons was made for the purpose of Court proceedings and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram and Co. Their Lordships, however, attribute no importance to either of these matters. Even if the *munim's* statement be regarded as proved—a point on which their Lordships are, in

P. C.

Bhagwandas Parasram v. Burjorji Rutlonji Bomanji.

the circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the Court might otherwise have as to the reality of the transactions.' But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the Court of First Instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships therefore hold there was no ground for setting aside the decree of the Court of First Instance, and they will therefore humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

Solicitors for Appellant :—*Ashurst Norris Crisp & Co.*

A. P. P.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. KUMARASWAMI SASTRI.

Sree Rajah Venkata Ramayya Appa Rao Bahadur Zemindar Varu and another. — *Petitioners.**

*v.*

Chakali Veeraswamigadu (dead) and another. — *Respondents (Defendants.)*

Venkata Ramayya v. Chakali Veeraswamigadu

*Estates Land Act—Suit in Revenue Court under—Appeal to District Court—Order of that Court directing return of plaint for presentation to proper Court—Appeal to High Court—C. P. Code of 1908, Or. 43, R. 1—Applicability to suits under Estates Land Act—Practice—Appeal under Or. 43, R. 1 converted into revision under S. 115 of the Code—Jurisdiction of Revenue Court—Conditions of—Defendant's plea if will affect jurisdiction.*

Order 43 R. 1 of the Code of Civil Procedure, 1908, which gives a right of appeal against an order passed under O 7, R. 10 thereof is inapplicable to suits filed in Revenue Courts under the Estates Land Act.

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* C. R. P. No. 1312 of 1917. — 19th December, 1917.
(A. A. O. No. 185 of 1917.)

Venkata Ramayya v. Chakali Veeraswami-gadu.

Where in an appeal in a suit under the Estates Land Act the District Court held that the suit was not cognisable by the Revenue Court and directed the plaint to be presented to the proper Court, *held*, that no appeal lay to the High Court against the order of the District Judge.

Their Lordships however treated the appeal as a Revision Petition under S. 115 of the Code.

When the allegations in the plaint bring the case within S. 77 of the Estates Land Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to go into complicated questions will not affect the juris diction of the Revenue Court

*Polemora Thammiah Naidu* v. *Sri Maharni Lady Gajapathi Rao* [1] followed.

Petition under S. 115 of the Code of Civil Procedure praying the High Court to revise the order of the District Court of Kistna in A. S Nos. 110 and 176 of 1914, preferred against the decree of the Court of the Suits Deputy Collector, Ellore in S. S. No. 1089 of 1913 (S. S. No, 724 of 1913, Narasapur Division.)

*P. Nagabushanam* for Appellants.

*B. Narasimha Rao* for Respondents.

The Court delivered the following

**Judgment**:—The Receiver of the Nidadavole and Medur Estates who is the appellant sued the respondent in the Revenue Court to recover Rs. 323-11-7, arrears of rent for faslis 1320 to 1322. The case for the plaintiff was that the lands were granted by the former zamindar at low rent to defendants 1 to 8 who were performing washerman services, that they ceased to do so and conveyed a portion of the land to the 9th defendant and that plaintiff was consequently entitled to recover the full rent claimed. Defendants 1 to 8 were *ex parte.* The 9th defendant pleaded *inter alia* that the lands were ryoti lands, that he has been paying the rent reserved ever since his purchase, that plaintiff has no power under the Estates Land Act to enhance the rent and that the suit was bad for misjoinder of parties. No question was raised as to the jurisdiction of the Court and at the trial plaintiff conceded that the lands were ryoti lands and that the defendant had occupancy rights. The Suits Deputy Collector decreed Rs. 51-13-9 as the proper rent payable. The 9th respondent appealed, but not on the ground that the Revenue Court had no jurisdiction. The grounds of appeal on the contrary proceed on the footing that the Estates Land Act applied. When the appeal was argued before the District Judge however, a preliminary

1. (1910) M. W. N. 431.

Venkata Ramayya v. Chakali Veeraswami-gadu.

objection was taken by the appellant in the District Court to the effect that the lands were service Inams and that plaintiff ought to have sued in a Civil Court, the Revenue Courts having no jurisdiction.

The District Court upheld the contention and directed the plaint to be presented to the proper Court. The appeal before us is against the order of the District Judge.

A preliminary objection has been taken by the respondent that no appeal lies against the order of the District Judge as the order was passed under Order VII, Rule 10 Civil Procedure Code 1908 (corresponding to S. 57 of the old Code) and Order XLIII Rule 1 Clause (a) which gives the right of appeal against the order passed under Order VII rule 10 is made inapplicable to suits in Revenue Courts by virtue of S. 192 of the Estates Land Act which specifies the provisions of the Civil Procedure Code applicable to suits, appeals and other proceedings under the Act and excludes Chapter XLIII of the old Code which corresponds to Order XLIII of the present Code. For the appellant it is contended that an appeal from the District Court to the High Court is not a proceeding under the Act, but from one Civil Court to another and that Order XLIII applies to such appeals.

There can be little doubt that if the Suits Deputy Collector had returned the plaint presented to him under S. 77 Cl. (1) of the Estates Land Act no appeal would lie to the District Court.

The question however is whether a second appeal lies to the High Court where the order directing the return of the plaint is passed for the first time by the District Court which is not a Revenue Court.

S. 189 provides that decrees and orders passed by the Revenue Courts shall be subject to appeal as provided in the schedule. No further appeals are specially given by the Act except to the Board of Revenue under Section 190. The schedule to the Madras Estates Land Act gives the description of the suit and the court to which an appeal lies. In respect of suits for rent under S. 77 of the Act an appeal lies to the District Court. S. 190 gives a right of Second Appeal to the Board of Revenue against certain orders passed on appeal by the Collector. So far as appeals from decrees of the District Court are concerned a second appeal has, though not expressly given by the Estates Land Act, been held to lie by virtue of S. 100 of the new Civil Procedure Code of 1908 and

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Chapter XLIII of the old Code which are not excepted by S. 192 (*vide Ravi Veeraraghavalu* v. *Venkata Narasimha Naidu Bahadur* [1], and *Venkataramier* v. *Vythilinga Thambiran* [2]). As regards orders not coming within the definition of "decree" in the Civil Procedure Code, S. 192, Clause (a) of the Estates Land Act enacts that chapter XLIII which corresponds to Order XLIII and relates to appeals from orders shall not apply to appeals or other proceedings under the Estates Land Act. It is argued that this section can only apply to appeals from the Revenue Court to the District Court, because it is only such appeals as are appeals under the Act, and that for appeals from the District Court to the High Court we have to fall back upon the provisions of the Civil Procedure Code as appeals from orders of the District Court to the High Court are not appeals or proceedings under the Estates Land Act. Reference has been made to the *Secretary of State for India* v. *Chelakani Rama Row* [3] and it is argued that the observations of their Lordships of the Privy Council (at page 624 to the effect that when proceedings reach the District Court, that court is appealed to as one of the ordinary courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply would cover equally cases of appeals under the Estates Land Act. The Forest Act does not contain any provision analogous to section 192 of the Estates Land Act excluding the operation of certain sections and chapters of the Civil Procedure Code (*Secretary of State for India* v. *Chelakani Rama Row* [3]) and can be distinguished on that ground. There is a great deal to be said for the contention of the appellant, but the matter is not *res integra*. The point is covered by authority and we think we are bound by the decision of this court to the contrary when the question directly arose for determination.

In Appeals against orders Nos. 349 to 355 of 1915 and *Visvanatha Mudaliar* v. *Mannar Naidu* [4] where it was held by Ayling and *Seshagiri Aiyar, JJ.*, and *by Ayling and Napier, JJ*, that no second appeal lies against an order of remand under Order XLI Rule 23 of the Civil Procedure Code and in Second Appeal No. 235 of 1917, Ayling and Phillips, JJ. held that no second appeal lies against an order dismissing a suit for default. The contention now raised by the appellant before us

1. (1914) I. L. R. 37 M. 443=27 M. L. J. 451. 2. (1913) 1 L. W. 89.
3. (1916) I. L. R. 39 M. 617=31 M. L. J. 324. 4. (1914) 1 L. W. 667.

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that appeals from the District Court to the High Court are not appeals contemplated by the Estates Land Act and the question of the effect of the observations of the Privy Council in *Secretary of State for India* v. *Cheliakani Rama Row* [1] were not raised in the above cases but as already pointed out there is nothing in S. 10 of the Forest Act which excludes any of the provisions of the Civil Procedure Code from its operation and second appeals have not been expressly excluded. It has been argued that S. 190 of the Estates Land Act would render the decision of the District Judge who returns a plaint to be presented to the Civil Court on the ground that the suit does not relate to an estate within the definition of the Act *res judicata* in all subsequent proceedings and can only be set right by the High Court in Second Appeal from the decision of the Civil Court to which the plaint is presented under orders of the District Judge; that proceedings will then have to be begun *de novo* in the Revenue Courts and that it could hardly have been the intention of the legislature that this circuitous course should be followed when an appeal from the order of the District Court to the High Court would be a quick and adequate remedy. We have to construe the plain meaning of S. 192, however desirable it may be that the legilsature should amend S. 192 by giving a right of appeal against orders of remand.

It is argued by the appellant's vakil that if Order XLIII of the Code is not to apply to suits under the Estates Land Act then the order directing the return of the plaint would be a decree within the meaning of the Civil Procedure Code as it would be an adjudication as to which no appeal would lie under Order XLIII by virtue of S. 192 of the Estates Land Act. It is difficult to see how the definition of 'decree' in the Civil Procedure Code can be controlled by anything in the Estates Land Act.

The preliminary objections must therefore prevail.

We have been asked to treat the appeal as a Revision Petition under S. 115 of the Civil Procedure Code. This section is not excluded by S. 192 of the Estates Land Act and we have power to deal with the appeal as a revision petition as the question in issue is one of jurisdiction.

The case for the plaintiff is that the land is ryoti land and that the defendants 1 to 8 who are pattadars are liable to pay the rent claimed. The 9th defendant is treated as a sub-tenant.

1. (1916) I. L. R. 39 M. 617.

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It is open to the plaintiff under S. 145 of the Estates Land Act to assent to the transfer of 5 acres and odd out of the 13 acres and odd held by defendants 1 to 8 in favour of the 9th defendant and we take it that the suit against the 9th defendant amounts to an assent. All that the 9th defendant pleaded was that the lands are jiroyiti lands and that the rent was being paid for a long time. He also claimed occupancy rights. Defendants 1 to 8 raised no defence. At the trial plaintiff's vakil admitted that the lands were ryoti lands and that the defendants had occupancy right. The only question that remained for consideration was whether the rent due was at the rate claimed by plaintiff or the rate admitted by the 9th defendant. S. 3 no doubt excludes lands granted on service tenure at favourable rent so long as the service tenure subsists but in the present case it is not alleged by the defendants in the written statement that the lands are now held on service tenure and on the evidence the Deputy Collector finds that the service is no longer rendered. There is no particular formality or procedure prescribed by the Act for putting an end to service tenures or anything which the landlord has to do in case services are discontinued in order to make the lands ryoti lands in cases where lands which were once ryoti lands are given to the occupancy ryot on a favourable rent in consideration of services to be rendered. Under the circumstances of this case it cannot be said that the lands must be deemed to be held under service tenure on the date of the suit. When the allegations in the plaint bring the case within S. 77 of the Act the suit must be filed in the Revenue Court and the jurisdiction of the court will not depend upon any pleas the defendant might raise. The fact that the court may have to go into complicated questions as the right of redemption by the Landlord or the continuance of the service on which lands were granted on favourable tenure will not affect the jurisdiction of the Revenue Court (vide *Polemera Thammu Naidu* v. *Sri Maharani Lady Gajapathi Rao* [1].

We are of opinion that on the admission of the plaintiff and 9th defendant that the lands were at the date of suit ryoti lands it must be taken that the lands in the possession of the 9th defendant were not held on service tenure on the date of the suit so as to bring the case within the exception to the definition of ryoti land in S. 3. Whether lands continue to be held on service tenure is a question of fact which must be raised on the pleadings.

1. (1910) M. W. N. 431.

We set aside the decision of the District Judge and remand the appeal for disposal on the merits. Costs will abide and follow the result.

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Venkata Ramayya v. Chakali Veeraswamigadu.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Ankalamma ... *Appellant* (2nd (Plaintiff)*

*v.*

Bellam Chenchayya and others ... *Respondents (Defendants 1 to 11).*

Ankalamma v. Bellam Chenchayya.

*Hindu Law—Joint Family—Father and manager—Bond in favour of—Discharge of liability under—Payment during lifetime of father to one of his sons only—Effect—Payment to one of heirs of the promisee under a bond—Validity*

Payment to one of the Co-heirs of a promisee under a bond does not discharge the promisor from his liability to pay under it. This principle is applicable to cases of payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed.

*Held*, that the liability of the obligor under a bond executed in favour of a Hindu father, who was also the manager of the joint family of himself and his sons, was not discharged by payment made, during the lifetime of the father, to one of his sons only.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddapah in A. S. No. 87 of 1916 preferred against the decree of the Court of the District Munsif at Proddatur in O. S. No. 647 of 1910.

*M. O. Parthasarathi Aiyangar* and *M. O. Thirumalachariar* for Appellants.

*A. Narasimhachariar for V. V. Srinivasa Iyengar* and *Venkatasubba Rao* and *Radhakrishnayya* for Respondents.

The Court delivered the following

**Judgment**:—The bond sued on was executed to the father of the 1st plaintiff. The 1st plaintiff's case was that it was assigned to him by the father. After filing the suit, he died and the 2nd plaintiff, is his legal representative. The 1st defendant is the son of the mortgagor. Defendants 2 to 11 are alienees of some of the properties mortgaged. The 12th defendant is the eldest son of the mortgagee. The defendants pleaded that the mortgage bond was discharged by the payment made to one Chinna Narayana Reddi. This Chinna Narayana Reddi was another son of Byreddi

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* S. A. No 1949 of 1916. 14th December, 1917.

Ankalamma v. Bellam Chenchayya.

Venkata Reddi, the original mortgagee. In the written statement, the case for the defence was that in a partition between the father and the sons, this bond fell to the share of Chinna Narayana Reddi and that after it came to him, there was a complete discharge of the obligation under the bond.

The District Munsif gave a decree to the plaintiff. In appeal after remand in which the District Judge asked for certain findings upon some subsidiary issues, the Subordinate Judge who heard the appeal finally has come to the conclusion that the payment to Chinna Narayana Reddi discharged the 1st defendant from liability and that the plaintiff is not entitled to claim anything under the bond.

The facts found are (a) that Venkata Reddi was alive at the time that the alleged payment was made to Chinna Narayana Reddi. Venkata Reddi and his son the 12th defendant were sentenced to transportation for life somewhere near 1880 and the discharge is alleged to have been in the year 1883. At that time, the father is alleged to have given a power of attorney to a person called Narayana Reddi. (b) It is further found thalt there was no partition as alleged by the defendants. The District Munsif has stated that there was no allegation that Chinna Narayana Reddi was the manager of the family and that it was not sought to establish it before him. In this Court, an attempt was made both by Messrs. Narasimhachariar and Radhakrishnayya to show that Chinna Narayana Reddi was actually managing the family affairs. But the circumstances nentioned by the Subordinate Judge negative any such presumption. After the father and the eldest son were convicted and sentenced to transportation for life, apparently every member of the family was endeavouring to get as much family property as possible into his own hands. In these circumstances, it is unlikely that any one of the members was looked up to as the manager of an undivided family.

On these facts, the question of law for decision is whether the payment to Chinna Narayana Reddi could discharge the 1st defendant from liability. Chinna Narayana Reddi was undoubtedly not a promisee. The learned Vakils for the respondents argued that as the money was advanced by the father while the family was still undivided every member of the family must be taken to be a co-promisee with the father. In the first place, there is no evidence as to the source of the money which was

lent. For all we know, it might have been the self-acquisition of the father. Even granting that it was from family funds that the father advanced the money, it does not follow that the other members of the family were co-promisees with him. The definition of 'promisor' and 'promisee' contained in the Contract Act negatives any such presumption. *Prima facie*, the word 'promisee' means a person in whose name, the document has been executed. No authority has been cited before us for the broad proposition that where money had been advanced by the manager of a joint Hindu family, the other members of the family would become co-promisees with him. The fact that the other members of the family have an interest in the debt is not enough to constitute them promisees: That is a techinical expression carrying with it certain rights; We are not prepared to hold that every person who has an interest in bonds or securities standing in the name of another is a co-promisee, even though that other may be the manager of the Hindu family of which he is a member. Therefore we must proceed on the footing that Chinna Narayana Reddi was not a promisee under the bond. He was one of the heirs of Venkata Reddi to whom the bond was executed. There were also other heirs including the plaintiff who were entitled to the money under this bond. The question therefore is whether payment to one of the co-heirs would discharge the obligor from liability. The principle regarding co-heirs would be equally applicable to co-parceners. In *Ahinsa Bibi* v. *Abdul Kader Saheb* [1] Bhashyam Aiyangar, J. accepts the proposition laid down by Mahmood, J., in the case in *Surju Prasad Singh* v. *Khwahish Ali* [2] and says that the co-heir of a single promisee is not entitled to give a discharge in respect of a bond executed to his ancestor. The Subordinate Judge has relied for his conclusion that payment to one of the co-heirs would discharge the obligor, upon *Sheik Ibrahim Tharagan* v. *Rama Aiyar* [3]. That case only decided that where payment is made in fraud of the other co-heirs to one of the co-heirs, the obligor is not discharged. Further there are some observations in the judgment which are against the view taken by the Subordinate Judge. There is nothing in that judgment to support his position. Mr. Parthasarathi Aiyangar has drawn our attention to the Full Bench decision in *Annapurnamma* v. *Akkayya* [4] where two learned

1. (1901) I. L R 25 M. 27 at 39. 2. (1882) I. L. R. 4 A. 512.
3 (1911) I L R. 35 M. 685. 4. (1912) I L. R. 36 M. 544. (F. B.)

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Judges of this Court held that payment to one of the co-promisees would be a good discharge. The Chief Justice was against that view. Even the two learned Judges who held that payment to one of the co-promisees would amount to a discharge, guard themselves by saying that the case of a co-heir, would stand upon a different footing. Sankaran Nair, J., at page 549 says that the proposition which he enunciated would not cover the case of co-heirs. Sadasiva Aiyar, J., uses similar language in his judgment. In a later case reported in *Muniandi Servai* v. *Ramaswami* [1], Sadasiva Aiyar, J., sitting with Hannay, J., held that payment to one of the co-heirs of the promisee would not amount to a discharge of the liability incurred under the bond. Coutts Trotter, J. in *Ponnusami Pillai* v. *Thyagaraja Pillai* [2] seems to doubt the correctness of the Full Bench decision in *Annapurnamma* v. *Akkayya*[3]. If the quesion for decision were whether the payment made to one of the co-promisees would amount to a discharge of the bond, it might become necessary to refer the matter to a Full Bench having regard to the fact that two cases in Calcutta, in which the question was fully argued and elaborately considered, took a different view: and to the fact that Coutts Trotter, J, is of opinion that the decision is opposed to the current of authorities in England. We refer to *Hossainara Begam* v. *Rahimannessa Begam* [4] and *Umesh Chandra Banerjee* v. *Dhinabhandu Mahanti* [5]. But that question need not be considered in this case. The principle seems to be clear that payment to one of the co-heirs of the promisee would not discharge the promisor from his liability to pay under the bond. The same considerations govern payments made to a junior member of a Hindu family during the life-time of its manager in whose favour the bond was executed. In the view we have taken, the decision of the Subordinate Judge must be reversed and that of the District Munsif restored with costs here and in the Lower Appellate Court. Time for payment is extended to 9th April 1918.

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1. (1914) 29 I. C. 586.
2. (1915) 3 L W. 22.
3. (1912) I. L R. 36 M. 544 (F. B.)
4. (1910) I. L. R. 38 C. 342.
5. (1918) 29 I. C. 956=21 C. L. J. 570.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE SESHAGIRI AIYAR.

Kunjam Venkataramanayya v. Dejappa Konde

Kunjam Venkataramanayya ... *Appellant** (*Plaintiff.*)

*v.*

Dejappa Konde and others ... *Respondents* (*Defendants*)

*Limitation Act of 1859, S. 1 Cl. 12—Alienation by a Hindu woman having only a contingent interest—The woman succeeding to the property—Lapse of years after succession—suit to recover property barred—Hindu widow sued as representative of the Estate—Decision binding on the reversioner as res judicata—Alienation by a Hindu widow—Reversioners not barred after 12 years from the alienation under the Limitation Act of 1859—Lapse of time after the alienation—Effect of on the onus of proof on the alienee to show justifiable necessity.*

Where after the death of the last male-holder, his widow V. and his mother G. sold some of the properties inherited of and V died in 1854 and G inherited the properties and she sold the properties in 1857 to a third person, who sued the vendee under V and G impleading G as a defendant. in the suit, and it was dismissed on the ground that G herself was barred by limitation and consequently the plaintiff was barred.

*Held*, in a suit by the reversioner to recover possession of the properties after the death of G in 1903, that the suit was barred by limitation under Sec. 1 clause 12 of the Limitation Act of 1859 as the conveyance by V. & G. was not capable of conveying G's interest as she had only a contingent interest and she could have sued to recover possession after 1854 and as she did not sue for possession she was barred and consequently the reversioners also were barred.

The suit is also barred by *res judicata* by reason of the decision in the suit 1857 to which G was a party as representing the Estate, the finding in which suit would operate as resjudicata against any person subsequently claiming in the interest of the Estate such as the present plaintiff reversioner.

*Per Seshagiri Aiyar, J.*—The rule that under the Limitation Act of 1859 if the widow is barred by limitation the reversioners would be equally barred does not apply to alienations by the widow because where a widow conveys property no question of adverse possession as against her arises unless the conveyance is inoperative to pass property.

Lapse of time after the alienation by the widow may enable the court to consider the evidence let in by the alienee favourably and to pay more atttention to the recitals in the conveyance than would otherwise have been done but it can have no weight when there is no substantive evidence on the question of necessity.

Second appeal against the decree of the District Court of South Canara in A. S. No. 162 of 1915 preferred against the decree of the court of the District Munsif of Puttur in O. S. No. 108 of 1914.

*H. Balakrishna Rao* for Appellant.

*K. Sundara Rao* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J*,: The facts of the case are as follows: The last male holder of the properties in suit died

* S. A. No. 68 of 1916. 24th July, 1917.

Kunjam Venkataramanayya *v.* Dejappa Konde.

Seshagiri Aiyar, J.

between 1841 and 1845. His widow Venkamma and his mother Gowramma sold the properties in that year. The sale-deed has not been produced but it is clear from Exhibit K that it was an absolute conveyance. Venkamma died in 1854. Gowramma who succeeded to the properties sold them to one Vasapayya in 1857. The purchaser sued the vendee under the two widows in the same year alleging that the sale set up by the latter was fictitious and that he was entitled to possession under Gowramma's conveyance. Gowramma was the 4th defendant in that suit. It was held that the sale by the two widows was genuine and that Gowramma herself was barred by limitation as the suit was more than 12 years after the 1st sale, the purchaser was also barred by limitation. It is clear that Gowramma never got possession. She died in 1908 and the present suit was brought within 12 years of her death by the reversioners to recover possession.

The Courts below have held that the suit was barred by limitation and that the sale must be presumed to have been for legal necessity. I am unable to uphold the latter conclusion. The onus is undoubtedly on the purchaser to establish necessity. Lapse of time may enable the Court to consider the evidence let in by him favourably and to pay more attention to the recitals in the conveyance than would otherwise have been done. But the considerations can have no weight when there is no substantive evidence on the question of necessity. See *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* [1]. I therefore hold that necessity has not been established.

On the question of limitation, I agree with the conclusion of the Courts below, though not with the reasons assigned for it. Under the Limitation Act of 1859, if the widow is barred by limitation, the reversioners would be equally barred. This is well established. See *Nobinchandra Chakrabarti* v. *Issur Chandra* [2] and *Sambasiva* v. *Raghava* [3]. The decision on review *Raghava* v. *Sambasiva* [4], does not affect this question. This principle does not apply to alienations by the widow. Where a widow conveys property, no question of adverse possession as against her arises, unless the conveyance is inoperative to pass property. Further her conveyance would vest in the purchaser all that she is capable of granting, namely her life interest and it is not incumbent upon the reversioner either to seek to displace the alienee or to

1. (1911) I. L. R. 38 C. 721 at 739.
2. (1865) 9 W. R. 505.
3. (1890) I. L. R. 13 M. 512.
4. (1891) 1 M. L. J. 392.

obtain a declaration that the alienation will not bind his interests. Although under the Specific Relief Act, (at least after the Limitation Act of 1871) he can sue for a declaration if he chooses, he is not bound to adopt that course. The result is that he is entitled to hold his hand until the widow dies. His right under the Hindu Law accrues only on her death and therefore he is not affected by the alienation of the widow. *Pursut Koer* v. *Palut Roy* [1] and *Sambasiva* v. *Raghava* [2] are authorities for the position that although under the Limitation Act of 1859 what bars the widow would bar the reversioner, her alienation would not give a cause of action, so as to bar him when succession opens. The courts below are therefore wrong in holding that the suit was barred on this ground.

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The real ground put forward by the learned Vakil for the respondent was this. The conveyance of 1845 by the two widows was not capable of conveying Gowramma's interest, as she had only a contingent interest. Consequently it was open to her to have sued to recover possession after 1854 : and as she did not sue for possession and was consequently barred, the reversioners also were barred. I think this contention is sound. The decisions in *Sham Sundar Lal* v. *Achan Kunwar* [3], and *Harinath Chatterjee* v. *Mathura Mohun Goswami* [4], support the contention. The learned Vakil for the appellant suggested that the conveyance of 1845 by both the widows should be looked at as if Gowramma consented to the alienation by Venkamma. I am unable to accede to this suggestion. In the case of a consent by the next reversioner, he or she gives a guarantee that the alienation by the person in possession is justifiable. There is no conveyance of the consenting party's interest by such an act; but a presumption arises that the act of the party in possession having been done in the interests of the estate, it is binding upon all persons entitled to it in succession. That is the principle that is deducible from *Ramadhin* v. *Mathura Singh* [5], *Venkatasubba Aiyar* v. *Muthuswami Aiyar* [6] and *Jumna Kunwar* v. *Ramhit Singh* [7]. But where a person joins in a transaction to which his adhesion can give no validity, it would not be right to argue that he consented to the alienation by the real owner. As

1. (1881) I. L. R. 8 C. 442.
2. (1890) I. L. R. 13 M. 512.
3. (1898) I. L. R. 21 A. 71. (P. C.)
4. (1893) I. L. R. 21 C. 8. (P. C.)
5. (1888) I. L. R. 10 A. 407.
6. (1916) 1 M. W. N. 123.
7. (1915) 28 I. C. 496

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pointed out by the Judicial Committee in *Shyam Sunderlal* v. *Achan Kunwar* [1], such a conveyance can only transfer the interest of the party in possession and no more. In this view, notwithstanding her joining in the sale of 1845, it was open to Gowramma to have sued to recover possession. She did not do so. She was therefore barred by limitation; and what barred her barred the reversioners, the plaintiffs. The decision in *Runchorddas* v. *Parvatibai* [2] does not affect this position, as in that case, the bar was not completed under the act of 1859.

The learned Vakil for the respondent also supported the judgment on the ground of *res judicata*. As this is a pure question of law not requiring any fresh facts, the contention may be dealt with by us in Second Appeal. As I said before, the purchaser from Gowramma sued in 1857 impeaching the sale of 1845 and Gowramma was the 4th defendant in that suit, the 1st defendant being the vendee of 1845. It was held in that suit, that as Gowramma was barred by limitation from claiming to recover, her vendee was equally barred. It is not necessary to canvass the correctness of this decision. It was binding on Gowramma and as the present litigation relates to the same object matter, it is binding on the reversioners. My learned brother and Mr. Justice Sankaran Nair seem to have come to a similar conclusion in *Venkoba Rao* v. *Nataraja Chettiar* [3]. There can be no question that there was active controversy between the 1st and the 4th defendants in that previous litigation. Therefore there was the bar of *res judicata* as against the 4th defendant.

I have mentioned this second ground also, although I am not as strong upon this point as I am on the question of limitation.

For all these reasons, I think the decision of the Courts below is right and that this Second Appeal should be dismissed with costs.

Spencer, J.

*Spencer, J*:—I agree. I think that the plaintiff's suit was rightly dismissed on the point of limitation, and that it must also have failed on the plea of res judicata, if that defence had been raised in the Courts below.

Under the Limitation Act XIV of 1859, Section 1 Cl. 12 the reversioners had 12 years to set aside the alienation in favour of

1. (1898) I. L. R. 21 A. 71. (P. C.) 2. (1899) I. L. R. 23 B. 725. (P. C.)
3. (1914) M. W. N. 903.

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Padma Konda from 1845 or 1847 whichever was the exact date of the sale, that being the time when the cause of action arose. This period could not be enlarged by the fact of Gowramma having joined her daughter-in-law in the execution of his sale deed, as Gowramma subsequently repudiated the transaction in the litigation of 1857 (vide Exhibit K). It must be taken that when she was made a party to that suit she represented the whole estate, (*See Harinath Chatterjee* v. *Mathura Mohan Goswami* [1] and *Venkoba Rao* v. *Nataraja Chettiar* [2]), that the possession of Padma Konde and his representatives was adverse to the title of any person claiming in succession to her from that date at least. The right of the reversioner to recover possession thus became barred in 1859 or at least in 1869, before the Limitation Act of 1871 which allowed 12 years from the date of the death of the widow, came into force in July 1879. Further in O. S. No. 461 of 1857 to which Gowramma was a party it was held on the 18th February 1859 that Padma Konda had perfected his title by more than 12 years adverse possession, a finding which would operate as res judicata against any person subsequently claiming in the interest of the estate to have the sale avoided.

In this view it becomes unnecessary to consider whether the District Judge had any legal evidence to support his finding that the sale to Padma Konda was for legal necessity.

This Second Appeal must be dismissed with costs.

C. A. S.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI IYER AND MR. JUSTICE NAPIER.

Madepalli Venkataswami and others ... *Appellants** *(1st Defendant.)*

*v.*

Madepalli Suranna and others ... *Respondents (Plaintiff and 2 to 5 Defendants.)*

Madepalli Venkata-swami v. Madepalli Suranna.

*C. P. C. of 1908—Sch. ii S. 14 cl. (c)—Scope and Effect—Award—Validity—Illegality patent on face of Award—What is—Award based on erroneous view of law—Effect—English law considered.*

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*S. A. 1461 of 1916. 15th November 1917.

1. (1898) I. L. R. 21 C. 8. (P. C.)
2. (1914) M. W. N. 908

Madepalli Venkataswami v. Madepalli Suranna

In a suit by a member of a Hindu family for partition of joint family properties in which the defence was that plaintiff was born blind and was not, under the Hindu law, entitled to any share, the parties referred to arbitrators all the questions of fact and of law in difference between them and the arbitrators decided that plaintiff was entitled only to a life interest in his share of the family properties. On objection taken to the validity of the award on the ground that it was illegal on the face of it because it proceeded on the erroneous view of law that, though plaintiff was not born blind, he was not entitled to his full rights in the family, *held* that the arbitrators having acted honestly and to the best of their judgment their award was not invalid under S. 14 cl (c) of Sch ii of the Code.

Scope of S. 14 cl. (c) of Sch. ii of the Code and the English law on the subject considered

Second Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Rajahmundry in Appeal Suit No. 4 of 1916 preferred against the decree of the Court of the Additional District Munsif of Amalapuram in Original Suit No. 245 of 1912.

*B. Narasimha Rao* for the Appellants.

*P. Somasundaram* for Respondents.

The Court delivered the following

**Judgment**:—Plaintiff sues for a share in the family properties. The defence is that he was born blind and that consequently he is not entitled to any share under the Hindu law. A number of issues were raised including the one on the question whether the plaintiff was congenitally blind. After the settlement of the issues, the parties agreed to refer the disputes to certain arbitrators. The agreement to refer is very general in its terms and apparently all questions of fact and of law were referred to arbitrators. Upon the reference, the arbitrators decided that the plaintiff was entitled to a life interest in a fourth share in the properties, subject to its becoming an absolute interest in case the plaintiff married.

On the submission of this award objections were taken by the plaintiff on the ground that it was illegal on the face of it and the court should not accept it. Both the courts below have upheld this contention and have set aside the award.

In Second Appeal the learned Vakils have argued the case very elaborately; we have come to the conclusion that the courts below are wrong.

S. 14 of the 2nd Schedule to the Civil Procedure Code sets out the grounds on which an award may be set aside; clause (a)

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refers to the arbitrators not deciding what has been referred to them and to deciding matters not within their jurisdiction; clause (b) refers to an indefinite award; clause (c) refers to an award whose illegality is patent upon the face of it.

In the present case, the complaint is that the award is illegal as it apparently proceeded on the ground that the plaintiff though not born blind is not entitled to his full rights in the family. It may be observed, in passing, that the rights of the plaintiff, were not beyond question until the recent decision of the Judicial Committee in *Mussammut Gunjeshwar Kunwar* v. *Durga Prasad Singh.*[1] The arbitrators were of opinion, whether rightly or wrongly, that the plaintiff should not have anything more than a life interest in the properties. Now, the point is whether this conclusion is so patently illegal as to come within the mischief of clause (c) of S. 14.

A large number of English decisions were quoted by Mr. Somasundaram for respondents: They all assume that where an error of law appears on the face of the award the error can be remedied by courts. The various dicta to be found on this subject all refer to the decisions in *Hodgkinson* v. *Fernie*[2] as first enunciating this proposition. On examining that case, we find this statement of the law in the judgment of Willes, J., one of the ablest Common Law judges of his time. If we may say so with respect we share the doubt expressed by the learned judge regarding the practicability and the soundnes s of enforcing the ancient principle referred to by him. Moreover, the later decisions to which we shall presently refer and the Civil Procedure Code do not appear to have accepted the proposition that an erroneous view of law appearing on the face of the award vitiates it. In *King and Duveen, In re*[3], Channel J. said that if on a question of law referred to the decision of an arbitrator, he has given an erroneous decision it should not be questioned by the court. In *Muhammad Newaz Khan* v. *Alam Khan*[4] the Judicial Committee have laid down the same principle. In *Gulam Khan* v. *Muhammad Hassan*[5] they say expressly that an arbitrator has jurisdiction to decide both on facts and on law and that the courts have no right to sit in judgment over his view. In *Adams* v. *Great North of Scotland Railway Co.*[6], the same view was held. See also

1. (1917) 34 M. L. J. 1. (P. C.) 2. (1857) 3 C. B. (N S.) 189.
3. (1913) 2 K. B. 32. 4. (1890) I. L. R. 18 Cal 414.
5. (1901) I. L. R. 29 Cal. 167. (P. C) 6. (1891) A. C. 31.

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*Deenabandhu Jana* v. *Chintamani Jana* [1]. As regard the decision in *British Westinghouse Electric and Manufacturing Company Ltd.* v. *Underground Electric Railways Company of London Ltd* [2], what was said by Lord Haldane in the House of Lords was that if the result of an arbitration was induced by a wrong direction as to law given by a court, the appellate court is not powerless and the court below is not entitled to shelter itself under the award. It is true that the decision of a Division Bench in *Landauer* v. *Asser* [3] supports the contention of the learned vakil for the respondents. But that case stands by itself and although there are dicta of a very general character in the English Reports, in no case except in the case in *Landauer* v. *Asser* [3] was an award set aside on the ground that the arbitrator has given an erroneous decision in law.

Coming to the Civil Procedure Code, we think that clause (c) of S. 14 should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. We are not supposed to have exhausted the category of the cases which may come under that clause; but we do think that where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that a judge might take a different view is not a ground for holding that the award is illegal on its face. We must reverse the decrees of the court below and remand the suit to the court of First Instance for its being heard on the other objections taken to the award. Costs to abide the result.

A. S. V.

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1. (1914) 19 C. W. N. 476.
2. L. R. (1912) A. C. 673.
3. (1905) 2 K. B. 184.

## PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART, AND SIR LAWRENCE JENKINS.

[On appeal from the Court of the Judicial Commissioner of Sind.]

Metharam Ramrakhiomal and others ... *Appellants**

*v.*

Rewachand Ramrakhiomal and others ... *Respondents.*

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Metharam Ramrakhiomal *v.* Rewachand Ramrakhiomal

*Hindu Law—Mitakshara—Joint family—Self-acquired property — Gains obtained from an education received at the expense of the joint family—Are they partible—"Science acquired at the expense of ancestral wealth"—Special and general education.*

Although the Mitakshara lays down that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father", this does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self-acquired property.

Appeal from a decree of the Court of the Judicial Commissioner of Sind, confirming a decree of a single Judge of that Court exercising jurisdiction as the District Court of Karachi.

The facts of the case are sufficiently set out in their Lordship's judgment. The suit was brought by appellants for a declaration that property which one Shewaram purported to devise as self-acquired was the joint property of a Hindu joint family to which he and they belonged and that the will passed no title to it. Both the Lower Courts held that the property in question was self-acquired. Leave to appeal to the Privy Council was granted on the ground that the appeal involved a substantial question of law, which had been expressly left open by the Board in *Pauliem Veloo* v. *Pauliem Sooryah*, [1] *viz.*, whether a mere general education such as Shewaram received was sufficient according to Hindu Law to constitute his earnings joint family property.

*P. O. Lawrence, K. C.* and *E. B. Raikes* for Appellants.

*De Gruyther, K. C*, and *O'Gorman* for Respondents.

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* October, 30 and 31 and 1st November, 1917.

1. (1877) L. R. 4 I. A. 109=I. L. R. 1 Mad. 252. (P. C.)

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*P. O. Lawrence, K. C.* for Appellants:—I put first the broad proposition that a general education imparted at the expense of the family makes the "gains of learning" of the person who receives it partible. The Mitakshara Chap. I S. IV clauses 1—11 (Colebrooke's edition, pp. 25-28) deals with effects not liable to partition. Clause 1 lays down the general rule that anything acquired by a man himself without detriment to the father's estate does not appertain to the co-heirs. This general rule runs throughout the section: the gains of science are separate only if the science is acquired without use of the father's goods (Clause 6). The vernacular of science is *vidya*: science then meant knowledge of the Vedas, the only knowledge of those times: it is equivalent to education. The illustration given in Clause 8 is that of science acquired when receiving a foreign maintenance. Gains derived from such science are not participable. Science there means any knowledge gained at the family expense, even reading and writing.

(*Sir W. Phillimore*: Or do you mean any knowledge or training which is exceptional for his position ?)

No: I would put it as any knowledge which has to be paid for.

To the same effect as the Mitakshara is the Mayukha—Chap. IV S. VII paras. 2, 4.

(*Sir Lawrence Jenkins*: Does the Mayukha apply in Sind ?)

I am rather doubtful: but it merely follows the Mitakshara on this point. The authority of the Mayukha in western India is discussed in *Mayne's Hindu Law*, para. 28. (p. 29 of 8th edition)

(*Sir Lawrence Jenkins*:—I think its authority only extends to Bombay Island and Gujerat. Sind has nothing to do with Gujerat: it is a mere accident of administration that it is associated with Bombay.)

In some of the earlier judgments the Courts came to the conclusion that although science included general education, yet if a son blossomed out into a particular line, his gains from that would not be partible. The first case of importance was *Chalakonda Alasani* v. *Chalakonda Ratnachalam* [1], which laid down that the gains of science were indivisible only when

1. (1864) 2 Mad. H. C. R. 56.

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the science was imparted at the expense of persons not members of the learner's family.

It was the case of a dancing girl specially educated at the expense of the joint family for her trade. The District Judge, Mr. Collett, in an elaborate judgment, came to the conclusion, on the Sanskrit authorities, that the gains of the dancing girl were impartible: but his judgment was reversed by the Madras High Court (Phillips and Holloway, JJ) who held that the gains of science imparted at the family expense are joint property.

(*Lord Buckmaster* : The only point of the judgment is where they say they are bound by authority. The rest is mere uncertain discussion of texts.)

Holloway, J. at p. 78 seems to distinguish between ordinary and extraordinary gains. In *Dhunockdharee Lal* v. *Gunput Lal*, [1] the Calcutta High Court took a contrary view to Madras, and held that the fact of defendant having been educated at the expense of the joint family did not necessarily make his gains acquired by the aid of such education joint but the facts of the case do not appear from either of the reports.

In *Bai Manchha* v. *Narotamdas Kashidas* [2] the Bombay High Court followed the Madras decision.

A later decision in Madras to the same effect was *Durvasula Gangadharadu* v. *Durvasula Narasammah* [3] where it was held that the professional gains of a Vakil who had received a general education at the family expense were joint.

(*Sir John Edge* : The education required for a High Court Vakil must have been less in those days. A High Court Vakil nowadays requires a very special education, more than is generally understood—more I think than is needed to be called to the Bar.)

C

Then came the judgment of this Board in *Pauliem Velloo Chetty* v. *Pauliem Sooryah Chetty* [4] where the point was discussed but explicitly left open, and since then there seems to have been a reluctance on the part of the Judges in India to follow the earlier decisions, which I submit are right and would ordinarily be binding. There have been four cases since.

1. (1868) 10 W. R. 122=11 Beng. L. R. 201 (note.)
2. (1869) 6 Bom. H. C. R. (A.C.) 1.
3. (1872) 7 Mad. H. C. R. 47.
4. (1877) L. R. 4 I. A. 109=1 Mad. 252.

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*Booloogam* v. *Swornam.*[1], *Lakshman Mayaram* v. *Jamnabai* [2] where for the first time a distinction is drawn between special and general education: *Krishnaji Mahadev* v. *Moro Mahadev* [3], and *Lachmin Kuar* v. *Debi Prasad* [4].

I submit that all these four later cases were wrongly decided and that the proper interpretation of the Article of the Mitakshara laid down in the earlier decisions has not been adhered to. My submission is that the true meaning of "science" is that given to it by the Courts before the Privy Council decision that it is equivalent to ordinary knowledge.

*Sir Walter Phillimore*: May not the test be whether there has been any *plus* education—more spent on one boy than on another ?)

In 1891 a Bill was brought forward (in Madras) to make the gains of education impartible but it created so much sensation that Government dropped it. The state of the law which that Bill was designed to alter is the state of the law for which I contend.

Counsel further submitted on the facts that even if the property in suit were originally separate, there was an agreement by Shewaram to throw all his funds into the joint purse.

*Raikes* followed: Under the Mitakshara maintenance plus *any* education would be a detriment to the family purse. The decisions which take the other view have come about partly through the Board's observations in *Pauliem* v. *Pauliem* [5], and partly through Mayne's observations based on the Dayabhaga. Till 1877 the decisions were unanimous in my favour: then came this Board's judgment in *Pauliem* v. *Pauliem* [5], and in 1878 the first edition of Mayne's Hindu Law appeared. Mayne deals with the matter in para. 283. The view he there propounds, so far as it deals with the construction of Mitakshara I. 4, 8, is an innovation introduced from the Dayabhaga: it has no proper place in the Western school of law. Mayne's observations are cited and misunderstood in *Lakshman Mayaram* v. *Jamnabai* [6].

Secondly, this is not a case where the learner received only the same education as the rest of the family. He had a better education than his elder brother : nor is it material that his younger brothers received the same education as himself.

1. (1881) I. L. R. 4 Mad. 330.
2. (1882) I. L. R. 6 Bom. 225.
3. (1890) I. L. R. 15 Bom. 32.
4. (1897) I. L. R. 20 All. 435.
5. (1877) L. R. 4 I. A. 109.
6. (1882) I. L. R. 6 Bom. 225 at pp. 242, 243.

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When the education was given none of these cases except *Bai Manchha* v. *Narottamdas Kashidas* [1], had been decided. Shewaram and Metharam may have been doubtful as to the legal position; the arrangement between them, even if invalid as a contract for want of consideration, may have been good as a compromise. Till 1888 Shewaram never asserted self acquisition.

[The Board intimated that they did not desire to hear arguments for respondent, but would be obliged if respondent's counsel could refer them to any other authorities.]

*De Gruyther, K. C.*, thereupon referred to Sir Thomas Strange's Hindu Law. Although the Mitakshara is in terms a commentary, yet as regards the people to whom it applies it is the law and you start from it. The texts on which the question depends are cited in Mr. Collett's judgment in *Chalakonda Alasani* v. *Chalakonda Ratnachallam*[2]. In Manu *Chap.* IX, slokas 206, 208 there quoted " without using the patrimony " means without using the family property in the actual exercise of your profession. So in Mitakshara Chapter I Section IV. paras. 10, 11, " to the detriment of the family estate" is equivalent to "without using the patrimony". This is made very clear in Strange's Hindu Law, at p. 213: "the essence of the exclusion consists in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family".

(*Sir W. Phillimore*: Your argument would go to destroy all those cases about special education).

That is not necessary for the decision of this case. Strange goes on to lay down (at p. 215) that the acquisition vests in the family only if the common fund has been *directly* instrumental: He has given as his authority certain passages in the Dayabhaga, but on the general question whether property is joint or self-acquired there is no distinction between the two.

(*Sir W. Phillimore*: But you say the Mitakshara is the law and we have to construe that.)

You have to decide what is meant by "science" and "to the detriment of the family", and in construing those words it is legitimate to refer to another work of great authority. Those passages of the Mitakshara have also been translated by Sir W. Jones: he translates as "learning" what Colebrooke renders as "science".

1. (1869) 6 Bom. H. C. R. (A. C.) 1. 2. (1864) 2 M. H. C. R. 56.

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*P. O. Lawrence* referred to *Durga Dat Joshi v. Ganesh Dat Joshi* [1].

Their Lordships' judgment was delivered (November 26, 1917) by

*Sir John Edge*:—This is an appeal from a decree, dated the 24th June, 1910 of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated the 3rd April, 1908, of a single Judge of that Court exercising jurisdiction as the District Court of Karachi.

The suit in which this appeal has arisen was brought in the Court of the District of Karachi on the 26th May, 1905, by the appellants here to obtain a declaration that the property which one Shewaram purported to devise by his will and a codicil was the joint family property of Shewaram, the plaintiffs and some of the defendants, and that the will and codicil were inoperative to pass any title to the property. Other reliefs were claimed, to which it is not necessary to refer. The executors of the will were amongst the defendants to the suit.

Shewaram died on the 27th May, 1899. He had been and was at the time of his death a member of a joint Hindu family, which was governed by the law of the Mitakshara. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

The plaintiffs, Metharam, Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhiomal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money-lending, and was carried on at Karachi, Seth Ramrakhiomal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued, and was carriedon under the management of the plaintiff Metharam, who was the eldest son. Shewaram, who was the second son, was born in or about 1847. He was educated at the expense of the joint-family at the Government school at Karachi, which in the evidence is referred to as a High School. At that school Shewaram learned to speak and to write English. When

1. (1910) I. L. R. 32 All. 305.

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he was 22 years old he became a pleader's clerk. He continued to be a pleader's clerk until 1878, when he entered the employment of Messrs. Volkart Brothers. He was subsequently in the employment of Messrs. Rose and Co., and in October 1881 he entered the employment of the firm of Charles Forbes and Co., as their head broker. With the latter firm he continued until he died in 1899. It may be assumed that the knowledge of English which Shewaram acquired at the Government school was of use to him as a pleader's clerk and in the other employments in which he was subsequently engaged. From the savings out of his salaries and brokerage, and from the profits which he derived from a money-lending business which he personally carried on, he acquired a fortune of about 2 lakhs and 50,000 rupees, which is represented by the property of which he purported to dispose by his will and codicil. The money-lending business which Shewaram personally carried on was started by him with capital derived from the savings out of his salary as a pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his will and codicil to dispose had been acquired by him as a member of the joint family, and was joint family property of which he could not dispose by will and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his will and codicil disposed was his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned Trial Judge fixed the following amongst other issues which are now immaterial :—

2. Did Shewaram acquire the property in suit with the assistance of joint family funds?

3. If not, did Shewaram join the property to the common ancestral property?

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained, nor was it contended before the Trial Judge that the property in question had been acquired by Shewaram by means of any special or other education. The Trial Judge, having stated in his judgment that the evidence in the case "covers nearly every

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year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned Counsel who appeared for the plaintiff appellants contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage through the general education which he had received from the joint family funds.

There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that subject and have called evidence in support of it. The learned Judges who heard the appeal considered that the English education received at the Government school at Karachi could not be regarded, for a well-to-do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the Trial Judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues, the Courts below have misconstrued a document in writing. The document referred to was a letter which was written by Shewaram to his brother Metharam, and was as follows :—

"My Dear Brother,

"I am ready to join my property with the family property, and take my share from it."

"SHEWARAM."

"Dated 1st October, 1888."

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The Trial Judge construed that letter as a conditional offer. "If you will come to partition I shall join my fund to yours"; implying "If you don't come to partition, I shall not join them."

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit showing that the joint family fund and Shewaram's self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of the 1st October, 1888. That story rested solely on the evidence of Metharam and Rewachand, and the Trial Judge entirely disbelieved it. The Judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition, and found that the offer was never accepted. The Courts below rightly construed the letter. In their Lordships' opinion, Shewaram's letter affords strong evidence that on the 1st October, 1888, his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had, before the 1st October, 1888, thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the Courts below did the Judges misconstrue the letter of the 1st October, 1888; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those Courts that the property in suit was the self-acquired property of Shewaram, and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family, the property which he acquired must be attributed to that education and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in S. 4. Ch. I. S. 4 deals with effects which are not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows:—

"1. The author explains what may not be divided, 'whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners; nor what has been gained by science."

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"5. He need not give up to the co-heirs what has been gained by him through science, by reading the scriptures or by expounding their meaning; the acquirer shall retain such gains.

"6. Here the phrase 'anything acquired by himself without detriment to the father's estate,' must be everywhere understood; and it is thus connected with each member of the sentence; what is obtained from a friend, without detriment to the paternal estate; what is received in marriage, without waste of the patrimony; what is redeemed of the hereditary estate, without expenditure of ancestral property; what is gained by science, without use of the father's goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed Asura or the like; what is recovered of the hereditary estate by the expenditure of the father's goods; what is earned by science acquired at the expense of ancestral wealth; all that must be shared with the whole of the brethren and with the father."

The Sanscrit word which Mr. Colebrooke translated as "science" was translated by Sir William Jones as "learning."

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the Mitakshara was *Chalakonda Alasani* v. *Chalakonda Ratnachalam* [1]. That case was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff's adopted daughter, the second defendant was the plaintiff's natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family, of gold and silver jewels and other personal property which represented gains of the first defendant in her calling of a dancing girl, she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

Mr. Collett, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanscrit texts, as translated, including the texts of the Mitakshara, Manu, Yajnavalkya, Narada, and the Dayabhaga and the works of some modern writers on Hindu law, said :—

"I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion; but I think that the true position is that the mere fact of a Hindu having received a professional-education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property

1. (1864) 2 Mad. H. C. R. 56.

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acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition, if there is none such, then the acquisition does not become joint property."

Mr. Collett made a decree in favour of the defendants with the exception of the house-utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. Phillips and Holloway, JJ., in their judgment in the appeal, said :—

"We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family."

And they allowed the appeal.

In *Dhunnookdharee Lall* v. *Gunput Lall and Others* [1] which was decided by the High Court of Bengal in 1868, the defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged to the joint family, and L. S. Jackson and Dwarkanath Mitter, JJ., in appeal dismissed the suit. Dwarkanath Mitter, J, added :—

"His (the plaintiff's) case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it."

In *Bai Manchha* v. *Narotamdas Kashidas and Others* [2] which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a vakil and as a money-lender, and it was held by Couch, C. J., and Newton, J., that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. Those learned Judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Chalakonda Ratnachalam and Another* [3].

In *Durvasulu Gangadharudu* v. *Durvasulu Narasammah and Others* [4], which was decided by the High Court of Madras in 1872, it was proved that a vakil had received from his father nothing more than a general education, and it does not appear that the vakil was distinguished by his professional learning. Kindersley, J., considered that the fair presumption was that such

1. (1868) 10 W. R. Civil Rulings, 122. 2. (1869) 6 Bom. H. C. R. (A. C. J.) 1.
3. (1864) 2 Mad. H. C. R. 56. 4. (1872) 7 Mad. H. C. R. 47.

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attainments as the vakil possessed had been acquired with the assistance of the family means, and that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the vakil were subject to partition. The judgment of Kindersley, J., suggests that he considered that if the professional gains of the vakil had not been merely the result of the general education which he had received at the expense of the joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. Holloway, J., entertained no doubt that the fund representing the professional earnings of the vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Ratnachalam and Another* [1], and especially to the statement in that case, that the ordinary gains of science by one who has received a family maintenance are certainly partible, and concluded his judgment by observing, "I do not believe, moreover, that within the meaning of the authorities the vakil's business is matter of science at all." Apparently, Holloway, J., regarded the learning in the law required by a vakil of his day as inferior to the science necessary to her success in her line of life of an Indian dancing girl.

In *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty*, [2] which came before this Board in 1877, the Board, on the evidence, found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the Mitakshara, chapter 1, Ss. 4, 6, 7, and 8, and the decisions in *Chalakonda Alasani* v. *Chalakonda Ratnachalam and Another* [1], *Dhunookdharee Lall* v. *Gunput Lall and Others* [3], *Bai Mancha* v. *Narotamdas Kashidas and Others*, [4] and *Durvasula Gangadharudu* v. *Durvasula Narasammah and Others* [5] were referred to in argument before the Board, and their Lordships with reference to them observed—

"it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property, is or is

1. (1864) 2 M. H. C. R. 56.
2. (1877) L. R. 4 I. A. 109=I. L. R. 1 M. 252
3. (1868) 10 W. R. O. R. 122.
4. (1869) 6 B. H. C. R. (A. C. J.) 1.
5. (1872) 7 M. H. C. R. 47.

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not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of *Sutherland's* 'Weekly Reporter,' in which a judgment was given by Mr. Justice *Jackson* and Mr. Justice *Mitter*, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in *Madras*, the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession was entitled to share in her gains; and the second, to the effect that the gains of a vakil who has received no special education for his profession are to be shared in by the joint family of which he is a member; decisions which have been to a certain extent also acted upon in *Bombay*. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of *Bengal* is not more correct than what appears to be the doctrine of the Courts of *Madras*.

That intimation appears to have have had its effect upon Courts in India.

In *Boologam* v. *Swornam*, [1] which was decided in 1881, Innes and Kernan, JJ., on the evidence having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family fund held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram* v. *Jamnabai*, [2] which was decided in 1882, Melvill and Kemball, JJ., who considered that the dictum of Mitter, J., in *Dhunookdharee Lall* v. *Gunput Lall and Others*, [3] that the Hindu law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping stone of all science," and consequently that the property which was acquired by a Subordinate Judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office

1. (1881) I. L. R. 4 M. 330. 2. (1882) I. L. R. 6 Bom. 225.
3. (1868) 10 W. R. 122.

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and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a Judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev* v. *Moro Mahadev* [1] which was decided in 1890, Birdwood and Candy, JJ., held that the gains made as *karkuns* by two members of a joint Hindu family who had received only a rudimentary education at the expense of the joint family were their self-acquired property.

In *Lachmin Kuar and Another* v. *Debi Prasad*, [2] Burkitt and Dillon, JJ., in 1897, approved of the decision in *Krishnaji Mahadev* v. *Moro Mahadev*, [1] and following it held that the gains from employment in the Commissariat Department of a member of a joint Hindu family, who was not shown to have had any assistance from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India, or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family, who had been educated at the expense of the joint family, are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanscrit word used in the Mitakshara which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the Courts in India. It gives the Sanscrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the Mitakshara, Vijnanesvara, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wider and more comprehensive meaning "learning."

In construing the texts of the Mitakshara which their Lordships have quoted, it is necessary to bear in mind that

1. (1890) I. L. R. 15 Bom. 32. 2. (1897) I. L. R., 20 All. 435.

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education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara, who was construing and explaining the more ancient texts of the Hindu law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must-have-been writing of education—learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for the contention in this case that the gains made as a clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. The question of whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to

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a person of his postition, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Drake, Son and Parton.*

A. P. P.

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# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE BAKEWELL.

Rajagopala Aiyar ... *Petitioner* (Plaintiff)*

*v.*

Sheik Davood Rowther ... *Respondent (Defendant).*

Rajagopala Aiyar v. Sheik Davood Rowther.

*Jurisdiction—Small Cause Court—Suit for recovery of unpaid consideration for a mortgage—Whether a suit for specific performance.*

A suit for recovery of part of the consideration that remained unpaid for a usufructuary mortgage is a suit for specific performance; and such a suit is not cognizable by a Court of Small Causes.

Case stated under Order 46. Rule 7 of the Code of Civil Procedure, 1908 by the District Judge of Tanjore in O. P. No. 5 of 1917 in Small Cause No. 1300 of 1916 on the file of the Court of Small Causes, Kumbakonum.

The District Judge made the following reference:

Petitioner asks for a reference to the High Court as to whether S. C. No. 1300 of 1916 on the file of the Small Cause Court, Kumbakonum is or is not cognizable by Court of Small Causes.

2. The suit as originally framed was to recover 5/6 of the profits of the land usufructuarily mortgaged to defendant on the ground that he had not paid 5/6 of the consideration for the mortgage or for Rs. 250 (which is 5/6 of the mortgage consideration of Rs. 300) plus interest at 12% total Rs. 351-2-0.

3. The plaint was presented originally as an original suit in the Court of the Principal District Munsif, Kumbakonum who returned it for presentation to the Small Cause Court. The Small Cause Court, Kumbakonum held that the suit was not cognizable there. The matter came up on rerefence before me in

* Ref. Case 8 of 1917. 6th August 1917.

O. P. No. 563 of 1916 when plaintiff agreed to amend his plaint and omit the first relief and confine the suit to the 2nd relief. He represented it to the Small Cause Court, Kumbakonum which has again refused it, on the authority of *Sheik Galim* v. *Sadarjan Bibi.*

Rajagopala Aiyar v. Sheik Davood Rowther.

4. The Small Cause Judge regards the 2nd relief as a claim for unpaid consideration for the bond, that is as a claim for specific performance of a contract. The ruling quoted is in support of his view. The relief asked for is not relief by way of damages but for specific performance of the contract.

5. On full consideration, I am inclined to support the Small Cause Judge's view. As each court (original and Small Causes) in turn has rejected the plaint, I refer the matter under Order 46 Rule 7, C. P. C. to the High Court for decision whether the plaintiff's suit as now limited to a claim for return of the unpaid consideration amount due under the mortgage bond is cognizable or not by a Court of Small Causes.

*P. R. Narayanaswami Aiyar* for Petitioners.

The Court delivered the following

**Judgment**:—The plaintiff in the suit executed a usufructuary mortgage in favour of the defendant for Rs. 300 of which he received only Rs. 50 and he has instituted this suit to recover the balance of Rs. 250 on the basis of the mortgage. The question is whether this is a suit for specific performance. The rulings of this Court in *Anantharam Kasmi* v. *Saidamadathulla* [2] and of the Calcutta High Court in *Sheik Gālim* v. *Sadarjan Bibi* [1] make it clear that this is a suit for specific performance, that is to say, a suit to enforce an agreement to lend money on a mortgage: and such a suit has been held not to lie. This is the law in England and has been followed in this country. The suit will not lie at all and no question of jurisdiction then arises. It is clear, however, that a suit for specific performance can only be instituted on the original side and not on the Small Cause side. The reference will be answered accordingly.

N. V.

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1. I. L. R. 2 M. 79. 2. I. L. R. 43 C. 59.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

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|---|---|
| Vysravanath Manakal Raman Somayajipad | *Appellants** (*Plaintiff*). |
| *v.* | |
| Marampure Thalakkodi Madhathil Karnavathi Kunhu Kutti Kovilamma, Nani Kovilamma and others. | *Respondents in S. A. No. 924 of 1916* (*Defendants.*) |

Raman Somayajipad v. Kunhu Kutti Kovilamma.

*Malabar Law—Devaswam—Uralan and Samudayi—Nature of office—Suit for redemption of Kanom by Samudayi without reference to Uralan—Maintainability of—Limitation Act* (*XIV of* 1859)—*Limitation Act* (*XXXII of* 1861)—*Title by prescription, if could be acquired under.*

A hereditary samudayi of a Malabar devaswom who has been in possession and active management of its properties for more than the statutory period without reference to the Uralan, is entitled to bring a suit in his own name for redemption of a kanom of the devaswom properties.

*P. K. Unni Nambiar v. C. M. Nilakandan v. Bhattathirpad*[1] *Kunyunneri Nambiar* v. *Nilakandan,*[2] *Rama Varar* v. *Krishna Nambudri*[3] *distinguished.*

Origin and history of the offices of Uralan and Samudayi in a Malabar Devaswom, considered.

Even before the enactment of S. 29 of the Limitation Act of 1871 a person in possession of property for the statutory period could acquire a prescriptive title to the same.

*Gunga Gobind Mundal* v. *The Collector of 24 Pergunnahs*[4], *Brindabun Chunder Ray* v. *Tara Chand Banerjee*[5], *Jagamba Goswamini* v. *Ram Chandra Goswami*[6], *Radhabai and Ramachandra Konher* v. *Anantrao Bhagvant Deshpande*[7] followed. *Kesava Pillai* v. *Peddu Reddi*[8] *not followed.*

Second appeals against the decrees of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suits Nos. 875 to 877 of 1914 preferred against the decrees of the Court of the District Munsif of Ottapalam in Original Suits Nos. 205, 206, and 479 of 1913.

*K. Srinivasa Aiyangar* and *Kuttikrishna Menon* for Appellants.

*T. R. Ramachandra Aiyar, N. A. Krishna Aiyar, A. S. Venku Aiyar* and *T. Eroman Unni* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgment**:—*Seshagiri Aiyar, J*:—S. A. No. 924 of 1916. The plaintiff styling himself as the Uralan and Udama of the

* S. A. Nos 924 to 926 of 1916. 15th November 1917.

1. (1882) I. L. R. 4 M. 141.
2. (1880) I. L. R. 2 M. 167.
3. (1880) I. L. R. 3 M. 270.
4. (1867) 11 M. I. A. 345.
5. (1873) 20 W. R. 114.
6. (1903) I. L. R. 31 C. 314.
7. (1885) I. L. R. 9 B. 198.
8. (1875) M. H. C. R. 95.

Kottaseri Devaswom sues to redeem a kanom of the year 1898 granted by him to the tarwad of defendants 1 to 11. Defendants 12 to 18 are now in possession of the properties. The 19th defendant obtained a surrender of the properties from defendants 1 to 11 and claimed to bethe real Uralan of the Devaswom. The defendants denied that the plaintiff was the Uralan and disputed his title to recover the demised properties. Both the Courts below, though not for the same reasons, dismissed the plaintiff's suit. Hence this Second Appeal.

Ramari Somayajipad v. Kunhu Kutti Kovilamma.

Seshagiri Aiyar, J.

Before dealing with the merits of the case, it is desirable to draw attention to a feature of Malabar litigation which amounts almost to an abuse of the machinery of Civil administration. I do not in the least feel influenced by considerations of the quantum of Court-fees paid. If the legislature has framed its provisions in such a way that a right can be litigated by paying a small fee, the litigant is entitled to avail himself of that privilege to his best advantage. But where litigants are permitted to avail themselves of the indulgence of the Court to convert what on the face of it appears to be a trivial and innocuous proceeding into a suit in which grave issues involving very substantial rights and large properties are adjudicated upon, it is the duty of the Court to use all its powers to prevent such an abuse.

To come to particulars. The present suit is based on a kanom, but the matter decided has practically no bearing on that question. It is the right of rival Uralans, that of the plaintiff and of the 19th defendant that has been considered in Judgments of enormous length which necessitated the examination of numerous documents old and new. With what result? In Second Appeal, we are called upon to pronounce our opinion on findings which in some instances we can treat as dealing with facts, and which in very many respects necessitate an enquiry into mixed questions of fact and law. If the respective rights of the plaintiff and of the 19th defendant were directly in issue, the suit would have been filed in a different tribunal from which a first appeal would have been preferred to this Court. I cannot help feeling that the leniency with which such litigations are treated may enable a suitor to choose his own time and forum for prosecuting his rights. Fortunately the integrity of the subordinate judiciary in this country is so well established that there is not much fear of miscarriage of justice by such devices. But it is not difficult to imagine circumstances which may lend themselves to the unscrupulous handling

Raman Samayajipad *v.* Kunhu Kutti Kovilamma.

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of a clever suitor to the detriment of his opponent. I hold very strongly with Mr. Justice Wilkinson that Courts should, as far as possible, refuse to allow a plain plaint to be construed as containing hidden causes of action and to pronounce an opinion thereon. The parties suffer more severely than the Government revenue through such an indulgence. I feel no doubt that the use of all the powers conferred on Courts relating to the addition or deletion of parties, to the returning of plaints for amendment or for presentation to the proper Court with reference to the substantial questions in issue, would tend to advance justice and not to retard it. It may discourage,—what is now pursued as a fine art—the compelling of Courts to deal with questions which *ex facie* have no relevancy to the reliefs stated in the plaint.

Before I leave this subject, let me refer to another concrete instance taken from this second appeal which enforces in a marked degree the necessity for the above caution. For nearly half a century the plaintiff's illom and the 19th defendant's Kovilagom have been playing a game of hide and seek. They dared not face each other. In suits for rent and for redemption, tenants were encouraged to set up the rights of the 19th defendant's Kovilagom. Documents were summoned from and produced by the rival claimant. Some of them were characterised as impudent forgeries in the earlier litigation; but as time has rolled on, they have gained sanctity by age: they have now risen to the distinction of being reverentially handled lest they crumble to pieces and to the dignity of being regarded by the translator as on undescipherable in places as to words, syllables and phrases. I am referring to Exhibit VII in particular; let us look at the result. On the present occasion, the Subordinate Judge, differing from the District Munsif and differing from a previous Subordinate Judge has held that the document is genuine. In second appeal we are perforce compelled to accept that finding. If, in the earlier litigation, the Court had refused to raise any issue on the rival claimants' rights or to permit subpoenas to be taken out on those issues, the question would soon have been brought to a head and the parties would have directly raised the point earlier. I have made these prefatory remarks as I feel that the laxity of the Courts helps dishonest litigants to resort to devices for stifling justice and for availing themselves of the processes of law to gain an undue advantage over honest litigants.

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Now I shall deal with the case bearing in mind the limitations which the law imposes on a Court sitting in second appeal. Mr. K. Srinivasa Aiyangar for the appellant and Mr. T. R. Ramachandrier for the respondent have placed before us all that can be said in favour of their respective clients. The main points for decision are:—

(a) Whether the Kovilagom of the 19th defendant has a subsisting uraima right in the plaint Devaswom;

(b) Whether the plaintiff is only a Samudayi; if so, what are his functions and privileges?

A large number of subsidiary issues have to be considered in connection with these two questions. The history of the uraimaship of the Devaswom is lost in antiquity. It is not disputed that three Nambudri Illoms were entitled originally to contribute each one uralan to the temple. Two of them became extinct before 1841. The last illom which may for brevity's sake be called the Oravil Illom had an undoubted claim to one uralan. From Exhibit XV, it is clear that the last surviving member of the Oravil Illom assigned the uraima right to the Padinhare Kovilagom of which the 19th defendant is the present Thamburatti. From subsequent documents which it is not necessary to refer to at length, it appears that the transferor regarded himself as jointly entitled with the Padinhare Kovilagom to be the uralan of the temple. It may be that the last member of the Oravil Illom acquired the rights of the two other illoms by Attaladakkam right. It is unnecessary to pursue this enquiry. The Oravil Illom became extinct in 1843.

To my mind, it admits of no doubt that originally the plaintiff's predecessors regarded themselves only as agents of the uralan. It is the subsequent development of their rights and the extinction or supercession of the rights of the 19th defendant's kovilagom that have to be considered in this case. I may at once say that the pretension of the plaintiff to style himself as the udama or the owner of the Devaswom has not a shred of evidence to support it. Mr. Srinivasa Aiyangar did not argue the case on that footing. His contention was that since 1860, the plaintiff's predecessors have been setting themselves up as the sole managers of the Devaswom and have thereby acquired an indefeasible right to manage its affairs, by whatever name they may be called. He

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also argued that the 19th defendant's kovilagom lost the right, if they possessed it at any time, by the bar of limitation.

It is common ground that the transfer referred to in Exhibit XV was incapable of conferring a legal right to the uraimaship Mr. Ramachandrier contended that by exercising the rights of a uralan since 1841, the 19th defendant's kovilagom acquired a prescriptive title to be uralans, that the management by the plaintiff was only in his capacity as Samudayi, that the latter did not and could not acquire the uraima right, and that therefore plaintiff has no right to recover possession of the demised properties.

These arguments of the learned vakil necessitate an enquiry into the respective rights and duties of a Uralan and of a Samudayi. It has to be borne in mind, in this connection, that the plaintiff's illom has been the hereditary Samudayis of the Devaswom long before 1841. Before referring to the cases which deal with the functions of the various dignitaries connected with a Devaswom, it may be useful to enquire into the history of their offices. In Malabar, as on the East Coast, temples, in most instances, owe their existence to the munificence of some ruling chief or nobleman. But it would be inaccurate to say that all of them have been so founded. In a small village, the villagers might establish a temple—not a few instances of this kind are to be found on the East Coast, and I do not suppose religious evolution has been working differently on the West Coast. Whenever an influential chief or karnavan founded a Devaswom, he would in addition to being its founder be its uralan also. Distance from the temple and other considerations might induce him to appoint others to manage the affairs of the Devaswom. The word *Samudayam* denotes an assembly of persons. That is its etymological meaning. The chief inhabitants of a village where the temple is founded would naturally be the persons to whom the management would be entrusted. They may among themselves select a person to be their agent or it may be that the founder himself might ask one person among the villagers to be the manager. In course of time, the successive discharge of duties by the members of the same family would ensure to that family the privilege of giving the manager from its members. This is the process by which the principle of heredity has been evolved all over the world; and in a country like India, where reverence for established institutions and for long continued practices is a sort of fetish, heredity gain

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recognition far more easily than elsewhere. In Malabar these conservative tendencies are at their highest. In my opinion, this process accounts for the existence of what are known as hereditary Samudayis. There are other hereditary offices connected with a Devaswom. I feel no doubt that at its inception the Samudayi was only the agent of the uralan, if there was one, but the reasoning by which a hereditary Samudayi can be regarded as a perpetual agent is a conception of law which demands serious consideration. Further, it is not correct to assume that the Samudayi remained an agent pure and simple even after the extinction of the house which founded the Devaswom. The suggestion of Mr. Ramachendrier that, if the Tarwad or Kovilagom which founded the Devaswom became extinct, the right of the uralan would escheat to Government requires more authority to support it than the learned vakil has given us. After the policy declared in Act XX of 1863 it is open to argument that the Government divested themselves of their right to claim this particular kind of escheat, even if the proposition is unexceptionable, that the right of trusteeship which vested in the owner of temporal properties would pass by reversion to the Crown by virtue of his private properties having escheated. It is more natural to suppose that the disappearance of the hereditary Uralan will be followed by the development of the Samudayam into the Uralan. In Moore's Malabar Law this process is hinted at as of constant occurrence. Mr. Justice Holloway seems to have set his face against this practice.

Before passing away from this subject, I may say that the main conditions regarding the respective functions of these officers of the temple are not to be gathered from *a priori* notions regarding their rights as understood in ancient times, but from the usages of the particular institutions concerned. There may be a temple in which the Uralan is the person in whom the property and the management vests and such a temple may have a Samudayi who will be the agent of the Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the dewaswom properties in the Samudayi. The Uralan in such a case will have very nearly the powers of a temple committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may

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be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case, the Samudayi will be the real Uralan.

On the merits, the first point raised by Mr. Srinivasa Aiyangar was that the suit should be confined to the consideration of the question whether defendants Nos. 1 to 11 have any valid defence to surrendering property which they obtained under the demise of 1898 and that the rival claims of the plaintiff and of the 19th defendant should not be gone into in this case. He argued that the 19th defendant was impleaded not because he claimed the Uraima right, but on the ground that he was the assignee of the other defendants. In view of the principles enunciated by me in the opening paragraph of this judgment, I would have been prepared to strike out all the averments on either side which do not relate to the question of surrender, had it not been for the fact that the plaintiff deliberately challenged the title of the 19th defendant and invited a decision upon the respective title of the parties. Even this may be ignored, but for the fact that the questions involved in the suit have been elaborately gone into in the two Courts and it would result in sanctioning a waste of judicial time and energy, if, at this stage, the plaint is directed to be amended by striking out the contentions relating to the 19th defendant or is directed to be presented to the proper Court on the ground that the substantial relief claimed in the plaint should be properly valued. The plaintiff apparently felt emboldened by his successes against tenants behind the back of the 19th defendant and was prepared to meet him in the open field. The 19th defendant thought that this was her last chance and concentrated all her strength upon establishing her case. Much as I regret that the Courts below should have allowed this suit to be treated in the way it has been done, I am not prepared to wipe out all that has been put on the record by either side and to treat the suit as one for redemption pure and simple. In this view, I do not consider it necessary to express any opinion on the interesting question of estoppel by tenant argued by the learned vakil for the appellant.

The next contention was that the Kovilagom of the 19th defendant had no right to the Uraima right. Until the Judicial Committee ruled in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*, [1] that an assignment of the trusteeship was opposed to

1. (1876) I. L. R. 1 Mad. 235.

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public policy, it seems to have been the practice not only on the West Coast, but also on the East Coast to transfer such rights. But the pronouncement of the Committee must be deemed to have declared the pre-existing law. Therefore, the question is whether the Padinhare Kovilagom acquired a prescriptive title to be the Uralan of the Devaswom. The learned vakil for the appellant contended that beyond an acknowledgment by the plaintiff's illom of their liability to render accounts, the Padinhare Kovilagom was not shown to have had any possession of the Devaswom properties either actually or constructively and that consequently no adverse possession was acquired. The documents to which the learned vakil for the respondent drew our attention show that the 19th defendant's Kovilagom was in management of the properties through the plaintiff's illom. Exhibits XXXIII, XIII, I, LXXXVII, I(*a*) and XII, among other documents prove active participation in the affairs of the Devaswom. The Subordinate Judge has found that up to 1860 the Padinhare Kovilagom "took an active part in looking after the affairs of the plaint temple"; and I think there is ample evidence to support this finding. I therefore hold that the 19th defendant's Kovilagom would have acquired a prescriptive title to the Uraimaship by the year 1860 if the law permitted them to do so. As regards the suggestion that that acquisition must be restricted to the right of one of the Uralans alone and that the plaintiff must be deemed to have adversely enjoyed the other two Uraima rights, it is enough to say that there is no trace in any of the numerous documents filed in the case that the plaintiff's illom prescribed for the rights of the two Uralans of the two extinct illoms.

The finding of the Subordinate Judge on this question is stated in these terms at the end of paragraph 18. "From 1886 onwards plaintiff's Mana was allowed to have its own way in all matters". Mr. Srinivasa Aiyangar contended that, as under the old Limitation Acts in force up to the year 1871, there was no provision for acquisitive prescription even granting that the 19th defendant's Kovilagom had possession of the Devaswom properties through their agents, they were not entitled to be regarded as Uralans. I was at first inclined to agree with this contention, but the course of decisions in the other Presidencies to which Mr. T R Ramachandrier drew our attention shows that even under the old Limitation Acts

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and Regulations, title by prescription was held to have been acquired. The decision in *Gunga Gobind Mundul* v. *The Collector of 24 Pergunnahs*, [1] certainly lends support to this proposition. At first it looks as if the suit brought by the plaintiff in that case was dismissed as being barred by limitation, but the observations in page 362 suggest that even under the old Acts a prescriptive title could have been acquired. This was the interpretation of that decision adopted in *Brindabun Chunder Roy* v. *Tara Chand Banerjee* [2]. The Calcutta High Court have taken that view consistently. See *Gossain Dass Chundur* v. *Issur Chundur Nath*, [3] and *Ram Chunder Ghosal* v. *Juggut Monmohiney Dabee* [4]. In *Jagamba Goswamini* v. *Ram Chandra Goswami*, [5] Justices Rampini and Pratt reviewed all the earlier decisions of their Court and said that notwithstanding the fact that there was no provision in the earlier Regulations and Acts of Limitation similar to S. 29 of the Act of 1871, title by prescription could have been acquired under the old Act, see page 317. In *Jagrani Bibi* v. *Ganeshi*, [6] the same view was enunciated following *Gossain Dass Chunder* v. *Issur Chunder Nath*, [3] and the decision of the Judicial Committee in *Ganga Gobind Mundal* v. *The Collector of 24 Pergannas* [1]. In *Radhabai and Ramachandra Konher* v. *Anantrav Bhagvant Deshpande*, [7] the Full Bench of the Bombay High Court accepted this view of the law. See the judgment of West J. at pages 228 and 229. As against these decisions there is an old decision of this Court in *Kesava Pillai* v. *Peddu Reddi* [8], in which it was pointed out that under the Act of 1859 no prescriptive title could be acquired. I do not think that it is safe to follow this ruling in preference to the pronouncement of the Judicial Committee which has been accepted in all the other High Courts. It is to be borne in mind that under the English law even before the statutes contained any provision by way of prescription the English Courts held that continued long possession adversely to the owner would confer title to the property. I therefore am of opinion that the 19th defendant's Kovilagom must be deemed to have acquired a prescriptive right to the property before 1860.

1. (1867) 11 M. I. A 345.
2. (1873) 20 W. R. 114.
3. (1877) I. L. R 3 Cal. 224.
4. (1878) I. L. R. 4 Cal. 283 at page 297.
5. (1904) I. L. R. 31 Cal. 314.
6. (1881) I. L R. 3 All. 435.
7. (1885) I. L R. 9 Bom. 198.
8. (1862. 1 M. H C. R. 95.

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The next contention of the learned vakil for the appellant was that since 1860 the 19th defendant's Kovilagom ceased to manage the temple affairs and that the plaintiff's illom acquired a prescriptive title thereto as Urâlan. Mr. Ramachandrier's answer was two-fold. He relied on the principle that "once a Samudayi always a Samudayi" and contended that the plaintiff's illom was incapable of acquiring a prescriptive title so long as it did not divest itself of the functions of a Samudayi; secondly, he contended that the course of conduct pursued by the plaintiff's illom showed that they only prescribed for a Samudayi's right and for no more.

As regards the first contention the learned vakil referred to S. 109 of the Evidence Act. It is true that once a relationship like that of principal and agent is established, it would require very strong evidence to show that relationship was abandoned and that a new right was asserted to the knowledge of the principal. But the position in the present case is not that of an agent appointed by the principal. As I stated before, it is a case of hereditary agents under hereditary principals. What I understand by the term hereditary agent or Samudayi is this : that ordinarily you will have to look to the family of the Samudayi for a person to manage the affairs of the Devaswom. On the death of the previous Samudayi and by the fact of a member of the Samudayi's family entering upon the duties of a Samudayi, it may be taken that he was impliedly appointed by the then Uralan to discharge the duties of an agent. It would not follow from this that the acts and declarations or omission of the previous Samudayi who was a member of the same family would be binding upon the succeeding Samudayi. I do not say that there should be a sannad of appointment in the case of each successor, but I would require very strong authority to convince me that each succeeding agent though he belonged to the same family was bound by the acts or conduct of his predecessor in office. Therefore, granting for the sake of argument that by Exhibits VII and XLIV the Samudayi in office at the time recognised the right of the 19th defendant's Kovilagom, it does not follow that that acknowledgment would affect his successor. The Subordinate Judge has given the dates of succession of the various Samudayis from 1843. It is clear from that statement in paragraph 3 that the Samudayi who acknowledged the title of the 19th defendant's Kovilagom in 1843 was succeeded by one Parameswaran Nambudri who died in 1852,

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that this man was succeeded by Narayana Somayajipad in 1872-1873 and that the plaintiff succeeded to the management in 1892-93. Now if there is evidence from 1892 onwards that the plaintiff repudiated to the knowledge of the 19th defendant's Kovilagom the title of that Kovilagom and asserted his right to be independent of that Kovilagom, I fail to see why the recognition by his ancestor in 1843 should be against his setting up a right in himself. In 1892—93 there was a very important proceeding to which sufficient attention has not been paid by the Subordinate Judge. In that year the Government contemplated instituting proceedings in escheat regarding the properties and rights possessed by the Oravil Illom. It is conceded that to this proceeding the plaintiff's illom as well as the 19th defendant's Kovilagom were parties. Mr. Ramachendrier relied upon these proceedings on the ground that the Government dropped their intention of claiming the properties by escheat because the 19th defendant's Kovilagam established its right to them. It may be that that consideration operated on the Collector to give up his idea of claiming the properties of Oravil by escheat, but at the same time it is clear that the plaintiff's illom set up its independent right to manage the Devaswom to the exclusion of the 19th defendant's Kovilagom. As the 19th defendant's Kovilagom was a party to these proceedings, her predecessors in interest must have been aware of the adverse claim set up by the plaintiff's illom.

Now the question is as to whether this assertion conferred a right on the plaintiff's illom to manage the properties without the intervention of the 19th defendant's Kovilagam. I am not now concerned in saying that the assertion amounted to claiming Uraima right itself. It may be that the plaintiff did not until 1902 set up a right as Uralan but if the plaintiff's predecessor Narayanan Somayajipad asserted that he was entitled to manage the properties of the Devaswom on the ground that there are no Uralans for the temple, will not that confer a right upon him to sue in his own name to recover property on behalf of the Devaswom. Mr. Ramachandraier strongly relied upon the decision in *P. K. Unni Nambiar* v. *C. M. Nilakandan Bhattathiripad* [1], for the proposition that a Samudayi can never sue to recover trust property. I have examined this case very carefully. I do not think that the present case is covered by that judgment. At the same time, I must

1. (1882) I. L. R. 4 Mad 141.

express my respectful dissent from some of the very broad propositions enunciated by the learned Chief Justice. Mr. Justice Innes' judgment is not really in conflict with my view. It was apparently found in that case that there was an Uralan in active management and that the hereditary samudayi was appointed by that Uralan. The learned Judge points out that the religious institution was in the hands of trustees or Uralans. In that view of the facts the learned Judge was right in holding that the Samudayi could not maintain a suit in his own name. The learned Chief Justice states that the powers of the Samudayi are confined to the management of the temple and that when occasion requires, resort should be had to the course of applying to the Uralans to lend their names. If it was intended to lay down as a general proposition of law that under no circumstances could a Samudayi institute a suit in his own name, I would respectfully dissent from the proposition. But, as I said before, the facts of the case justify the conclusion arrived at in the judgment of the Court. The other case relied upon is *Kunjunneri Nambiar* v. *Nilakandan* [1]. The judgment in that case is very short and from the statement of facts it is clear that the Samudayam was a hereditary one and that the Samudayi executed the kanom deed as the agent of an existing Uralan. *Rama Variar* v. *Krishna Nambudri* [2] was a case where the Samudayi managed the temple affairs under a written agreement executed to the Uralan. On the other hand we have some unreported decisions in which it has been held that a Samudayi can maintain a suit in his own name. Second Appeal No. 61 of 1881, Second Appeal No. 1688 of 1888 and Second Appeal No. 2256 of 1914. The truth is, in a conservative country like Malabar, where the dead weight of pre-existing custom is found to be intolerable, recourse is being had constantly to circumvent that custom by circuitous methods. It may not be the province of the Court to encourage such devices but where a long-standing practice has come into existence which is not in strict conformity with preconceived notions and which is not opposed to reason or justice, courts will not be justified in falling back upon old usage and to refuse to pay attention to the course of development in recent years. It may be that a Samudayi was not originally intended to usurp the functions of a trustee, but it would be idle to deny that they have successfully usurped the duties

1. (1880) I. L. R. 2 Mad. 167. 2. (1881) I. L. R 3 Mad. 270.

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of the trustee in recent years, have completely ignored the Uralans, and have placed themselves in possession of the Devaswom properties. I am not therefore prepared to accede to the contention of Mr. Ramachandrier that the moment a person is described as a Samudayi he must be confined to the exercise of the functions which in ancient times were considered to be his, and that he should not be permitted to acquire new rights and obligations. The cases quoted by him only show that there must be an open and notorious disavowal of agency before a new right is prescribed. *Williams* v. *Pott* [1], *Burdic* v. *Garrick* [2], *Attorney General* v. *Corporation of London* [3], *Corea* v. *Appuhamy* [4], and *Lyell* v. *Kennedy* [5] are all cases where the courts required the strongest proof on the part of the agent who set up a title adverse to the principal. I do not take these decisions to lay down that under no circumstances can an agent prescribe for the rights of the principal. On the facts of the present case I am prepared to hold that there has been a distinct repudiation of agency by the plaintiff's illom and the acquisition of an independent right to manage the Devaswom affairs without recourse to an Uralan. It is not necessary for me to say that the plaintiffs have become trustees. As was pointed out by the Judicial Committee in the case in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* [6], in order to enable a person to sue on behalf of a religious institution, all that is necessary is possession and management of its affairs. If both these are found it does not matter by what name the person is known. Moreover since 1892 the plaintiff's illom had been granting demises in their own name and have been instituting suits to recover demised properties in their own name. The 19th defendant's Kovilagom never instituted any suit or granted any demise since at least 1860. Under these circumstances, I have come to the conclusion that the right to institute a suit on behalf of the Devaswom has become vested in the plaintiff's illom and that it is not open to defendants 1 to 11 to refuse to surrender the properties which they obtained on demise from the plaintiff.

On the question of what would suffice as repudiation of agency, I may refer to *Dadoba* v. *Krishna* [7], *Nabab Mir Sayad Alamkhan* v. *Yasin Khan* [8] and *Sankaran* v. *Krishna* [9] quoted

1. (1871) L. R. 12 Eq. 149 at p. 151.
2. (1870) 5 Ch. App. 233.
3. (1849) 2 Mac. and G. 247
4. (1912) A. C. 230.
5. (1889) 14 A. C. 437.
6. (1904) I. L.R. 32 Cal. 129.
7. (1883) I. L.R. 7 Bom. 34.
8. (1893) I. L. R. 17 B. 755.
9. (1893) I. L.R. 16 Mad. 456.

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by Mr. Kutti Krishna Menon. It is true that in Travancore and Cochin, the Samudayi is regarded as being entitled to sue for rents but not to sue to recover possession. See *Nilakandaru* v. *Nilakandan* [1]. These cases must be confined to Samudayis who have been appointed by the Uralans. In conclusion I must guard myself by saying that I do not decide that the 19th defendant has no rights in the temple. Whether she is still Uralan, and if she is, whether her rights are only those of supervision and control may have to be decided. It is enough for the disposal of the present litigation to say that the plaintiff has acquired a prescriptive right to manage the Devaswom properties by granting kanoms and by instituting suits for redemption etc., and is entitled to possession. I must therefore reverse the decree of the Court below and remand the appeal. There is issue 8 regarding improvements which have to be decided by the Court of appeal. In the circumstances of this case having regard to the extravagant rights set up by the plaintiff and to the fact that the 19th defendant is not altogether an interloper, I think it is proper that each party should be directed to bear its own costs hitherto incurred.

Napier, J.

*Napier, J.* :—I agree and only wish to add that in my opinion the proposition that a hereditary Samudayi whose office entails the doing of many acts of management is a mere agent of the Uralan and thus affected by the ordinary principles of agency, if that is what is intended to be laid down in the early cases, requires reconsideration.

*Judgment in Second Appeal* No. 925 *of* 1916.

This Second Appeal follows the decision in Second Appeal No. 924 of 1916. The Lower Appellate Court will have to decide issue II as well.

*Judgment in Second Appeal No.* 926 *of* 1916.

Following the judgment in the principal case, the decree of the Lower Appellate Court is reversed. The Subordinate Judge will now decide Issues 2 and 6.

A. V. V.

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1. 18 R. L. R. 129.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Adiraja Arsu *alias* Kumaraya Ballala ... *Appelant* (Petitioner in C. R.P. No. 1015 of 1916 on the file of High Court and 1st Deft.)*

*v.*

Sheik Budan Sahib and others ... *Repondents (Respondents in the above petition, Plaintiff and Defendants 2 and 3).*

Adiraja Arsu *alias* Kumaraya Ballala *v* Sheik Budan Sahib.

*Religious Endowment—Temple—Sale of goods on credit to manager—Liability of temple funds.*

In a suit to recover the price of fireworks sold on credit to the manager of a Hindu Temple the plaintiff is not entitled to a decree against the temple funds as the purchase of fireworks is not necessary for the performance of the trusts.

*Palaniyappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* [1] relied on.

Appeal under S. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Coutts Trotter, dated 20th July 1917 in C. R. P. No. 1015 of 1916 preferred to the High Court against the decree of the Court of the District Munsif of Karkal in S. C. S. No. 76 of 1916.

*B. Sitarama Rao* for Appellant.

*K. Ramanatha Shenoi* for Respondent.

The Court delivered the following

Bakewell, J.

**Judgments**:—*Bakewell, J.*:—The question in this case is, what is the remedy of a person who has sold goods on credit to the Manager of a temple to be used for the purposes of the institution? It has been found that the plaintiff, the vendor, was aware that the 2nd defendant, the purchaser, was the manager and that he made the purchase of fireworks for the temple, and that those goods were necessary for the temple.

A temple is a permanent religious charity, carried on for the benefit of the present and future worshippers and it is obvious that its property should be preserved intact in order that the existence of the charity may be continued, and that its income alone should be applied by the manager or dharmakartha in the administration of the charity. (See *Palaniappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* [1].) It follows that

*L. P. A. No. 95 of 1917. 6th December 1917.

1. (1916) I. L. R. 40 M. 709, 712 (P. C.)

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the manager has ordinarily no authority to dispose of the capital of the institution, since such a disposition would endanger its very existence, and that his authority is ordinarily limited to the receipt of the income and its proper disbursement in the up-keep of the fabric and the performance of the customary ceremonies.

It has been held by their Lordships of the Privy Council that as a general rule of Hindu Law, "property given for the maintenance of religious worship and of charities connected with it is inalienable." (*Prosunna Kumari Debya* v. *Gulab Chand Baboo* [1]), but that under certain circumstances the manager of that property is "empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir" (Ibid. page 152). That decision and other cases were fully considered by their Lordships in a recent case reported in *Palaniappa Chetty* v. *Sreemath Daivasikhamani Pandara Sannadi* [2], where it was contended that the manager had power to grant a permanent lease of land belonging to the temple at a fixed rent and in consideration of a premium in case of necessity and for the benefit of the institution. Their Lordships observe "that the only specific point touching the present case actually decided in those three authorities was this: That a debotter estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration" (page 718); and, although they point out that it is not possible to define precisely the things which may constitute a benefit to the estate and justify the exercise of this power, the illustrations which they give relate to the preservation of the institution and its endowments.

They also point out that there must not only be a benefit to the estate from the exercise of the power, but there must be an unavoidable necessity for the alienation. The manager should therefore consider in each case whether the particular alienation of the temple property which is contemplated is the most provident disposition which can be made in the interests of the institution.

It follows, I think, from these propositions that the manager has no authority to pledge the credit of the temple, because the result would be that strangers to the trust would be able to proceed against the general property of the temple in execution of

1. (1875) L. R. 2 I. A. 145, 150. 2. (1917) I. L. R. 40 M. 709=33 M. L. J. 1.

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their decrees, and the consequent alienation of its property would not be made by the trustees acting upon a due consideration of the interests of the temple. Moreover, the manager would in this direct manner obtain much larger powers of disposition than the reported decisions allow him.

The District Munsif has held that the purchase of fire-works was necessary for the temple, but this is not sufficient; the necessity must relate to the preservation of the temple or the maintenance of the religious service, and the discharge of fire-works though customary at certain festivals cannot possibly be included in these purposes. For these reasons I am of opinion that the purchase of these goods was not within the authority of the 2nd defendant as manager of the temple, and the temple funds cannot be made liable for the price in these proceedings.

No question has been raised as to the powers of one manager or trustee to act without the concurrence of his co-trustees, but I may point out that even if under the scheme of management one manager has authority to collect and disburse the income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise deal with its capital without the concurrence of his co-trustees.

For these reasons I would allow the appeal and set aside the decree of the District Munsif and remit the case for retrial upon the question of the personal liability of the second defendant and direct the respondent to pay the costs of the 1st defendant throughout.

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—I agree with my learned brother that the plaintiff is not entitled to a decree against the assets of the temple as the purchase of fire-works cannot be said to be necessary for the performance of the trusts. I concur in the order proposed.

A. V. V.

## PRIVY COUNCIL.

PRESENT:—LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART. AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Tarini Charan Sarkar ... *Appellant**

*v.*

Bishun Chand and others ... *Respondents.*

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Tarini Charan Sarkar *v* Bishun Chand.

*Revenue Sale—Bengal Land Revenue Sales Act,* 1859 (*Act* 11 *of* 1859) ; *Ss.* 31 *and* 53—*Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by the proprietor from dishonest motives—Code of Civil Procedure,* 1908 (*Act* V *of* 1908). *Ss.* 107 *and* 151 ; *O.* 41. *R.* 33 –*Powers of the Court of Appeal—Estoppel.*

The Bengal Land Revenue Sales Act, 1859 (Act 11 of 1859), S. 31 provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court ; but the section nowhere transfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector

Where the property is bought by the recorded proprietor and the estate is acquired, under S. 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under S. 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the benamidar of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds :—

*Held,* that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumstances relating to the sale, the Court had abundant power under Sections 107 and 151, and Order 41

* 26th November, 1917.

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R. 33, of the Code of Civil Procedure, 1908, to vary, as it did, the decree in the prior mortgagee's suit;

*Held*, also, that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief.

Consolidated Appeals from a judgment of the Calcutta High Court (Chitty and Teunon, JJ.) dated the 25th April 1912, modifying one and affirming two other decrees made by the Subordinate Judge of Arrah.

The facts of the case sufficiently appear from their Lordships' judgment.

*De Gruyther, K. C.*, and *J. M. Parikh*, for Tarini Charan Sarkar, opened his three appeals: Bishun Chand was estopped from impeaching the revenue sale. He was a party to the suit brought by Sri Kishun but did not plead therein that Tarini Charan and not Sangam was the real owner of the property. Instead of insisting that all mortgages should be paid out of the mortgaged property Bishun Chand allowed a decree to be made against the surplus sale proceeds only. He cannot say in one suit that the sale encumbrances are enforceable against the sale proceeds and in another that they are enforceable against the estate. (Reference was made to the Bengal Land-Revenue Sales Act, 1859, Ss. 31, 37 and 53, and The Transfer of Property Act. 1882 (Act 4 of 1882) S. 73).

*Dunne, K. C.*, and *B. Dube*, for Bishun Chand, were not called upon to argue Tarini's appeal but were asked to open Bishun Chand's appeal: Both Ramratan and Sri Kishun were entitled to be paid out of the sale proceeds only, as they treated the revenue sale as valid in every way, Sri Kishun's decretal money was recoverable under the decree of the Subordinate Judge from sale proceeds only. The High Court had no jurisdiction to modify the decree and make the mortgaged property liable at the instance of Counsel for Tarini, who had not appealed. Under S. 31 of Act XI of 1859 Sri Kishun was entitled to treat the revenue sale as valid and to recover his mortgage money from the revenue sale proceeds. Tarini fraudulently brought the revenue sale and is not entitled to any equity. It is not open to the High Court to vary the decree under the Code of Procedure except by an appeal for the purpose. Although the appeals were heard together the findings in one appeal could not be used to influence the judgment in another appeal.

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*De Gruyther, K. C.*, submitted that the High Court had ample jurisdiction to make a proper decree upon the facts proved before it All the parties were before the Court. Reliance was placed on Ss. 107 and 151 and O. 41, R. 33, of the Code of Civil Procedure, 1908. Reference was made to *Tricomdas* v. *Gopinath* [1].

The judgment of their Lordships was delivered (November 26, 1917) by

Lord Buckmaster.

*Lord Buckmaster.*—These four appeals have been consolidated by order of the Board dated the 26th March, 1917, and have been brought on and heard together.

In three of them Tarini Charn Sarkar is the appellant and Babu Bishun Chand is one of the respondents, and in the fourth Babu Bishun Chand is the appellant and Tarini Charan Sarkar is a respondent.

All the appeals are against a judgment of the High Court of Calcutta dated the 25th April, 1912, and three decrees made by that Court consequent on the judgment.

The questions raised arise out of certain mortgage transactions affecting a Tahal Touzi No. 7062 and, though the facts and circumstances are complicated and involved, for the purpose of explaining the real issues that have to be decided they can be briefly summarised.

In the early part of 1904 the registered proprietors of the said Touzi were Ram Ratan Sarkar in respect of a 4-anna share, and Sangam Sarkar in respect of the remaining 12-anna share. The Touzi, however, was subject to certain mortgages, of which it is only necessary to mention the following: Zarpeshgi Thicca of the 15th July, 1889, in favour of Gajadhar Lal and Sri Kishun Lal to secure 11,506 rupees and interest at 9 per cent. per annum, a further mortgage in favour of the same mortgagees dated the 16th July, 1889, to secure 11,000 rupees and interest at the rate of 12 annas per cent. per month and a mortgage of the 10th February, 1896, in favour of the said Babu Bishun Chand to secure a loan of 5,999 rupees with compound interest at the rate of 24 per cent. per annum with half-yearly rests. In the year 1900 a 4-anna share of the estate was sold in execution of a mortgage decree and was bought on the 8th August, 1900, by Ram Ratan Sarkar, and on the 7th March, 1904, the

1. (1916) L. R. 44 I. A. 65.

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said Touzi estate was purchased on a sale made in execution of a decree at the suit of another mortgagee by one Chatarbhuj Sahai in the name of one Mahanand Sahai, and he, on the 14th May, 1904, purported to sell the property to one Sangam Sarkar. Sangam Sarkar was, however, but a mere name, it has been found, and it cannot now be questioned that the real purchaser was the appellant Tarini Charan Sarkar, who thus became the owner of the property subject to the mortgages.

On the 2nd June, 1904, the first of the suits, out of which these appeals proceed, No. 39 of 1904, was instituted by Babu Bishun Chand seeking relief in respect of his mortgage of the 10th February, 1896, against the representative of the original mortgagor and other parties. It would seem impossible that any estate could bear for long the burden of a mortgage on which the debt was accumulating by a process of compound interest on the principal sum at the rate of 24 per cent. per annum; and it appears, that the appellant Tarini Charan Sarkar, instead of adopting what might have then been the inconvenient process of redeeming the mortgage by payment, resorted to the device of causing the mortgaged property to be sold for arrears of Government revenue and himself becoming the purchaser. To secure this object he wilfully allowed the Government revenue to fall into arrear, and the property was in consequence sold by the Government on the 28th August, 1906, nominally as the property of Ram Ratan Sarkar and Sangam Sarkar, the registered proprietors, and was purchased for 29,500 rupees by Tarini Charan Sarkar, the true owner. Had Tarini Sarkar been successful in concealing the fact of his ownership the result of this device would have been that the claim of all the mortgagees would have been thrown on to the balance left of the 29,500 rupees—after satisfying the Government debt; and he would have held the property free from the inconvenience of the many and heavy charges to which it was subjected. Directly after the sale—on the 22nd October, 1906, Sri Kishun Lal and others instituted proceedings (No. 258 of 1906) to obtain payment in respect of the mortgage of the 15th July, 1889, seeking to obtain payment out of the surplus proceeds of the money due under the mortgages, the amount of which was stated to be—at the date of the proceedings—15,983 rupees. To these proceedings Babu Bishun Chand was by an order dated the

17th January, 1907, added as a defendant. On the 2nd December, 1907, Bishun Chand instituted his second suit, No. 153 of 1907, alleging that the purchase of the estate on the 14th May, 1904, was really made by Sangam Sarkar, *bénami* for Tarini Charan Sarkar, that the sale for arrears of Government revenue had been fraudulently effected by the said Tarini Charan Sarkar, and asking either that the sale should be set aside or that his mortgage of the 10th February, 1896, should still remain valid and operative against the estate. In the first suit, No. 39 of 1904, the usual mortgage decree was made on the 6th January, 1905, but it was set aside on the 18th April, 1907, and another trial was ordered. This took place on the 30th June, 1909, when the usual mortgage relief was granted.

In the second suit by Sri Kishun Lal and others judgment was delivered on the 23rd December, 1907, and a decree made in favour of the plaintiffs directing that the money due on the mortgage with interest and costs should be paid out of the surplus proceeds of sale. At the date of this decree the sale itself had become a subject of attack, and consequently the further provision was introduced that, in the event of the sale being set aside, the mortgage monies, interest, and costs should be realised by sale of the mortgaged property if the sum were not paid within six months from the date of decree.

The said Tarini Charan Sarkar did not appeal against this decree, but Babu Bishun Chand did, and the appeal came on for hearing together with the appeal by Tarini Charan Sarkar in the two suits commenced by Bishun Chand and an appeal by Sangam Sarkar in the suit No. 153 of 1907.

On the 25th April, 1912, the High Court delivered judgment, dismissing all the appeals; but at the instance of counsel who appeared for Tarini Charan Sarkar they varied the decree of the Subordinate Judge, in the suit by Sri Kishun Lal, by setting aside the direction that his mortgage monies should be paid out of surplus monies of the revenue sale, and made in its place the ordinary decree against the property itself. It is this latter part of the decree that is challenged by the present appeal of Bishun Chand.

Before dealing, however, with his contention, it is desirable to dispose, in the first instance, of the appeals of Tarini Charan Sarkar. He stands in this position: He is held to have been the

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real owner of the estate Touzi 7062 at the date of the sale of the 28th January, 1906, and it is further established by the findings, both of the Subordinate Judge and of the High Court that he deliberately allowed the Government revenue to fall into arrear in order that the property might be sold, and that he succeeded in purchasing it himself at an under-value under circumstances which concealed his original ownership, and appeared to establish an independent sale to an independent third party, so that all the claims of the mortgagees, beyond the amount that would be satisfied by the surplus proceeds of sale, would be wholly defeated.

These grave and serious charges are therefore supported by the concurrent findings of both the Courts, and no grounds whatever can be shown for disturbing these decisions. Counsel for Tarini Charan Sarkar undoubtedly realised this difficulty, and refrained from attacking the substance of the judgment, but said that it was one which Bishun Chand had no right to claim, because he was estopped by his own conduct from seeking any such relief.

This estoppel is said to be effected by his action as a defendant in the suit brought by Sri Kishun Lal and his co-mortgagees. This suit—it will be remembered—was brought after the revenue sale and sought relief against the proceeds. In that suit the plaintiffs alleged that there had been intentional default in payment of the Government Revenue, but they made no reference to the fact that Tarini Charan Sarkar was the real owner, a fact of which they were probably unaware, and which in any event was wholly immaterial to them, since the money in Court was sufficient to satisfy their claims. Bishun Chand was only made a party to this suit as an encumbrancer upon the property. He had no power of controlling the form in which the suit was brought, nor was there any step which he took in the suit irrevocably asserting his intention to rely upon the sale and not impeach the whole proceedings. In these circumstances, it is obvious that no estoppel arises as against him, and as this is the only ground upon which the appeal of Tarini Charan Sarkar is or can be based, it follows that it must fail.

There remains the question of Bishun Chand's appeal, and the question to which that gives rise is one of more general importance. On his behalf it is alleged that Sri Kishun Lal and his co-mortgagees are entitled to be satisfied out of the proceeds

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of sale, and that, if these are sufficient for the complete satisfaction of their mortgages, their encumbrances are removed from the property, with the result that there is a more abundant security for Bishun Chand's claim; that, in fact, the proceeds of the first sale to the extent of Sri Kishun Lal's claim, are to be added to the proceeds of the sale made under the decree of the High Court, so as to make one fund out of which the mortgage debts may be satisfied.

In order to examine the value of this contention, it is necessary to look at "The Land Revenue Sales Act," No. XI of 1859, by which the rights of the parties are regulated. S. 31 of that statute provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court.

It is to be observed that this section nowhere transfers the charges from the property to the proceeds; but, as the sale by the Government conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in Court.

It was a decree under this section that was obtained by Sri Kishun Lal, and it of course proceeded upon the assumption that the sale had been made to a *bona fide* third party. S. 53 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before. Were such a purchase honestly and openly made, it was not disputed that the claims against the purchase money could not remain in addition to the claim against the estate. The appellant, however, says that in the present case the owner cannot claim this method of administration. He asserts that as it was by the fraud of Tarini Sarkar that the whole transaction was set on foot he is in a worse position than if he had become the purchaser on a sale made against his will.

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Their Lordships are certainly not prepared to assist in providing any possible benefit for a course of conduct so dishonest as that revealed in this case but, on the other hand, it is not right to punish a man for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. In the present case it is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Thier Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the sale or the purchase. The only effect of the statute is that, so far as the encumbrances are concerned, the sale is of no effect.

It is then urged that the Court of Appeal had no power to vary the order made in Sri Kishun Lal's suit, since he did not request such variation, nor were the facts relating to the sale proved and established in any suit to which he was a party.

Their Lordships think it would have been a matter for regret if the Court of Appeal had been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the Court by Ss. 107 and 151 of the Code of Civil Procedure of 1908 and O. 41, R. 33 of the same statute. S. 107 gives power, if necessary, to take additional evidence; and R. 33 of O. 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require.

On hearing the appeal in Sri Kishun Lal's suit, the Court had before it the facts that showed all the circumstances relating to the sale. Sri Kishun Lal seems to have raised no objection to the variation of the order, and does not appear here on appeal against it. It is Bishun Chand, in whose suit all the facts were established, who seeks, on the one hand, to retain a judgment based upon the view that the sale was regular, and, on the other, to get the benefit of the decree which determined that it was not. There is certainly in the statute which gives him such rights, and there is no equity to which he can appeal which entitles him to their possession. This appeal must therefore also fail.

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It may be doubted whether in the end any property will be left for the real owner. Bishun Chand's mortgage runs at 24 per cent. compound interest with half-yearly rests. It began at 5,000 rupees, and in the hearing before the Court it amounted to 40,000; and the long delay, amounting to five years, that has elapsed in prosecuting this appeal has more than doubled the amount. Usury and the abuse of legal procedure are a formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the Courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion.

Eleven years have elapsed since Bishun Chand first instituted the proceedings in respect of his mortgage, and more time must pass by before the accounts are finally worked out and his claim ends; and having regard to the rate at which his debt accumulates, in a short time the amount might reach the total wealth of the entire province.

All the appeals, therefore, fail, and in all the circumstances their Lordships think there should be no costs on either side. They will humbly advise His Majesty to this effect.

Solicitors for *Tarini Charan Sarkar*:—*E. Delgado.*

Solicitors for *Bishun Chand*:—*Barrow, Rogers* and *Nevill.*

A. P. P.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Raghavalu Naicker ... *Petitioner** (*Complainant.*)

*v.*

Singaram and another ... *Respondents* (*Accused*)

Raghavalu Naicker v. Singaram

*Criminal case—Trial—Complaint of offences triable one as "summons case" and the other as "warrant case"—Procedure—Single trial—Order discharging accused—Effect—Fresh complaint in respect of same offences committed in same transaction—Maintainability—Cr. P. C. Ss. 247, 259—Applicability.*

* Crl. R. C. No. 677 of 1917 Crl. R. P. No. 536 of 1917. 14th February, 1918.

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Where, in a case in which a complaint was made of offences under Ss. 352 and 504 I. P. C. committed in the course of one and the same transaction, the complainant was absent on the date fixed for the case and the Magistrate discharged the accused by an order which stated 'Complainant absent. Accused discharged', *held* that the order did not amount to an acquittal of the offence under S. 352 Penal Code, and that it was not a bar to a fresh complaint in respect of the same offences committed in the same transaction

*Per Abdur Rahim* :—Where two offences are alleged to have been committed in the course of the same transaction, one of which is triable as a warrant case and the other as a summons case, the proper procedure ordinarily speaking is to have one trial and the case ought to be treated for purposes of the procedure to be followed as a warrant case.

*Per Napier, J.* :—Unless the Magistrate chooses to separate the two offences which are complained of and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him in one case is one punishable by six months or less does not make that part of the trial a summons case and it is not, in such a case, open to the Magistrate to apply the procedure applicable to a summons case, namely, the procedure under S. 247 of the Code of Criminal Procedure.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the court of the 3rd Presidency Magistrate of George Town, Madras, dated the 4th September 1917, in C. C. No. 15911 of 1917.

*R. N. Aiyangar* for *M. Narasimham*, for the petitioner.

*W. V. Rangaswami Aiyangar*, for the accused.

The *Crown Prosecutor* on behalf of the Crown.

The Court made the following

Abdur Rahim, J.

**Order** :—*Abdur Rahim, J.* :—A complaint was made under Ss. 352 and 504 Indian Penal Code before the 2nd Presidency Magistrate On the date fixed for the case the complainant was absent and the Magistrate discharged the accused. Then a fresh complaint was lodged with reference to the same transaction before the 3rd Presidency Magistrate and he held that so far as the offence under S. 352, Indian Penal Code, was concerned the order of the 2nd Presidency Magistrate operated as an acquittal and that the case should be proceeded with only with reference to the offence under S. 504 I. P. C. We are asked to consider whether the order of the 3rd Presidency Magistrate that there has been an acquittal within the meaning of the law with respect to the charge under S. 352 by reason of the previous order of the 2nd Presidency Magistrate, is right.

The case relating to an offence under S. 352 is a summons case inasmuch as the punishment for such an offence is not more

than 6 months' imprisonment, while the case relating to S. 504 I. P. C., is a warrant case, the punishment under this section being more than 6 months' imprisonment. It has been ruled in *Rajnarain Kunwar* v. *Lala Tamoli Raut.*[1], that where there are two offences complained of, one of which is triable as a warrant case and the other as a summons case, the proper procedure to be followed is that relating to the greater charge, namely, that of a warrant case. There is no express provision in the Criminal Procedure Code with reference to this matter. The learned Judges of the Calcutta High Court apparently proceeded on a general principle that the procedure to be followed should be that laid down with reference to the major charge and not the more summary procedure with reference to the minor offence. Now the Magistrate under S. 235 of the Criminal Proceedure Code is empowered, where more than one offence has been committed by a person by a series of acts so connected together as to form the same transaction, to try all the offences at one trial or separately. Here the transaction in which the two offences are alleged to have been committed was undoubtedly one and the same and the Magistrate could therefore try both the offences at one trial.

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Abdur Rahim, J.

Then the question is whether he treated the case before him as a summons case or a warrant case, or as two cases, one a sumons case and the other a warrant case. It seems to me that if he wanted to try the two offences together, the case would be one and not two separate cases; and the punishment which could be awarded against the accused in such a case would be more than six months' imprisonment and that would bring it within the definition of a warrant case. It has been pointed out by the learned pleader for the accused that the complainant was absent when the case was taken up and he argues that it was open to the Magistrate at that stage to separate the two charges and try them as two different cases, one a summons case and the other a warrant case, and that we must presume that he did so and therefore his order of dicharge must be taken to amount to an acquittal with reference to the offence under S. 352. But the Magistrate passed only one order 'Complainant absent. Accused discharged'. If he was, as suggested by the learned pleader for the accused treating the matter for trial before him as two separate cases and wanted to deal with the charge under S. 352,

1. (1884) I. L. R. 11 C. 91.

Raghavalu Naicker v. Singaram.

Abdur Rahim, J.

I. P. C. under S. 247 of the Criminal Procedure Code, the proper order for him to pass would have been one of acquittal. But he did not pass any such order. The order he passed was one of discharge, which would be the proper one if he treated the case before him as a warrant case coming under S. 259 Criminal Procedure Code which authorises him, in the absence of the complainant in a warrant case, to discharge the accused if the offence complained of was compoundable. It would *prima facie* be unreasonable to suppose that where there are two charges arising out of the same transaction the Magistrate would think of separating the two, applying thereto two kinds of procedure. There was one transaction in the course of which the two offences are alleged to have been committed and in such cases the proper procedure ordinarily speaking is to have one trial; and then, as laid down in *Rajnarain Kunwar* v. *Lala Tamoli Raut* 1 the case ought to be treated for purposes of a procedure to be followed as a warrant case having in regard the graver charge. This rule has been followed in *Re Sobhanadri* 2 by a learned Judge of this court sitting singly and also in *Hossein Sardar* v. *Kalu Sardar* 3. It is also mentioned with approval in *In re Samsudin* 4. I would therefore set aside the order of the 3rd Presidency Magistrate in so far as it holds that the order of the 2nd Presidency Magistrate dated 27th August 1917 amounts to an acquittal of the offence under S. 352, Indian Penal Code.

Napier, J.

*Napier, J*:—I agree. In my opinion there was no summons case before the 2nd Presidency Magistrate at all. The Magistrate took the complaint on his file, a number was given to it and he was prepared to hear it. The complainant was absent and he passed an order which was undoubtedly intended to be an order under S. 259 of the Criminal Procedure Code. It is therefore clear to me that he was trying the whole case as a warrant case. The definition section does not speak of summons *offences* and warrant *offences* but of summons *cases* and warrant *cases*, and has reference to the case before the Court. Where the Code deals with offences it divides them into cognisable and non-cognizable but where it is dealing with procedure then it speaks not of "offence" but of "cases." I am therefore satisfied that, unless the Magistrate

1. (1884) I. L. R. 11 C. 91.
2. (1916) I. L. R. 39 M. 503.
3. (1902) I. L. R. 29 C. 481.
4. (1896) I. L. R. 22 B. 711.

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chooses to separate the two offences which are complained of and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him in one case is one punishable by six months or less does not make that part of the trial a summons case. In this view it seems to me that the Magistrate had no option but to pass an order under S. 259 if he decided to dispose of the case and that it was not open to him to apply the procedure which is only applicable where he is in fact trying a summons case, namely the procedure under S. 247. For these reasons I agree with the order proposed by my learned brother.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

### [FULL BENCH.]

PRESENT:—MR. JUSTICE AYLING, MR. JUSTICE COUTTS TROTTER, AND MR. JUSTICE SESHAGIRI AIYAR.

Pandiri Veeranna .... *Appellant* (Plaintiff).*

*v.*

Grandhi Veerabhadraswami *alias* Veerabhadrudu. .... *Respondent (2nd Defendant).*

F. B. — Pandiri Veeranna v. Grandhi Veerabhadra-swami.

*Limitation Act (IX of 1908) Ss. 19 and 21 (2)—Acknowledgment by partner, when binding on partnership—Evidence of express authority, if necessary.*

Direct evidence of a specific authority by a co-contractor or partner to his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, is unnecessary and such an authority can be inferred from circumstances.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Rajahmundry in Original Suit No. 3 of 1916.

* A. S. No. 348 of 1916. — 20th February 1918.

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When the case came on for hearing in the first instance

The Court (Chief Justice and Kumaraswami Sastri, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Wallis, C. J.

*The Chief Justice*:—It is quite clear in this case that the 1st defendant and his adult son, the 2nd defendant, carried on business as timber merchants with the joint family property. It is also clear that the advances made by the plaintiff were made to them both, and that the 2nd defendant was personally liable on them as well as the 1st defendant. This is abundantly proved by the fact that the 2nd defendant has signed the settlements in the plaintiff's books Exhibit A dated the 27th April 1907, and A1 dated the 12th September 1909, and the promissory-notes D dated the 1st May 1907 and E dated the 13th September 1909. He did not sign the settlement A2, the promissory-note F dated the 26th September 1910, or the letter J dated the 1st October 1910, as he was absent, but on the 7th February 1911 he signed the letter Exhibit G, set out in the judgment of the Subordinate Judge, in which he stated that he and his father had been borrowing from the plaintiff, that his father had settled accounts on the 26th September 1910 and signed in the plaintiff's book, that he had not signed as he was not present, and that subsequently they had received further advances to the extent of Rs. 4,000. In this letter he undertook to discharge both these amounts on his personal liability and added "There subsists also my personal liability for the whole of the amount payable according to your accounts. As I did not sign in your accounts, this letter was written and given". He did not however sign the subsequent settlement A3 dated the 7th September 1913 or the promissory-note Exhibit H dated the 7th September 1913, or the letter Exhibit K dated the 9th September 1913 by which the 1st defendant acknowledged the joint indebtedness to amount to Rupees 9,855 and arranged for a further advance of Rupees 1,200 for which they were to give a fresh mortgage. The plaintiff has given evidence in support of his case, and neither the first nor the 2nd defendant has ventured to go into the box; and the witnesses called for the 2nd defendant to prove that he had no connection with his father's business, are contradicted by the documents under his own

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signature already mentioned. There is evidence, and it is the 2nd defendant's case, that for the last few years he has been looking after a cloth business, and according to the plaintiff's evidence the 1st defendant was the manager and always wrote the letters and invoices relating to the timber business.

In these circumstances, the only question is whether the suit is barred against the 2nd defendant personally, and this depends on whether the 1st defendant can be assumed to have had implied authority to sign the settlement in Exhibit A4 and the letter Exhibit K on behalf of the 2nd defendant as well as himself. The last acknowledgments were made by the 1st defendant when he was managing the joint timber business which was being carried on with joint family funds by the 1st and 2nd defendants as co-contractors or partners and while the 2nd defendant was looking after another business. According to the decisions of this Court in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* [1], and in *Shaik Mohideen Sahib* v. *Official Assignee of Madras*[2] these facts are not sufficient to raise a presumption that the 1st defendant had authority to make an acknowledgment on behalf of the 2nd defendant. In the latter case it was expressly decided that the fact of a partner being left in management of the business did not give rise to a presumption that he was authorized to sign acknowledgments. I have pointed out in *K. R. V. Firm* v. *Seetharamaswami* [3], that a different view has been taken by other Courts in India in the cases cited to which may be added *Lalta Prasad* v. *Babu Prasad* [4] and also apparently in England where the statutory provisions are substantially the same as in India. The point is fully discussed in *K. R. V. Firm* v. *Seetharamaswami* [3] and, as it is one of great importance to the commercial community, we have decided to refer to a Full Bench the question whether, in the absence of direct evedence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business?

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—I agree to the reference proposed by my Lord, as I am of opinion that the decisions in *Valasubra-*

1. (1908) I. L. R. 32 Mad. 421.
2. (1911) I. L. R. 35 Mad. 142.
3. (1913) I. L. R. 37 Mad. 146.
4. (1909) I. L. R. 32 All. 51.

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Kumaraswami Sastri, J.

*mania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* [1] and in *Shaik Mohideen Sahib* v. *Official Assignee of Madras* [2] require reconsideration in the light of the decision in *K. R. V. Firm* v. *Seetharamaswami* [3] which, if I may say so with respect, gives cogent reasons for placing on S. 21 of the Limitation Act a more liberal construction in conformity with the decisions of the other High Courts. There is no essential difference between the position of partners in England and India and if under S. 251 of the Contract Act the act of one partner which is necessary for or is usually done in the course of the business binds the other partners, there is no reason why acknowledgments of liability or payments made by one partner should not bind the others. I have rarely come across any instance where partners, while providing for authority to borrow on behalf of the firm, make any express provision for acknowledgments or payments with reference to limitation. Very often the partnership agreement restricts the powers of certain of the partners to borrow, but when there is no restriction, business is conducted on the footing that one who has the power to borrow has also power to settle accounts, make payments and in general to do all things necessary to ensure the credit of the firm. It is well known that Marvadis and Nattukottai Chetties who open account with persons insist on periodical settlements and would make no further advances unless accounts are settled when required. The object of the settlement is to prevent disputes as to its correctness and pleas of limitation from being raised. It is dfficult to see why partners who allow business to be conducted on lines which are well known to everybody should not be presumed to have given authority in the absence of evidence that the authority to borrow was limited and excluded the doing of things which are ordinarily done where accounts are opened with money-lenders.

I do not think that the wording of S. 21 concludes the matters or makes any difference in the general law applicable to partners. The use of the words "by reason only of" in the Acts of 1877 and 1908 instead of the words 'by reason of' suggests that the legislature did not intend to affect the powers of one partner to bind another by acts falling under S. 251 of the Contract Act. If it is shown that one patner has been borrowing money, making

1. (1908) I. L. R. 32 Mad. 421. 2. (1911) I. L. R. 35 Mad. 142
3. (1913) I. L. R. 37 Mad. 146.

payments and settling accounts without objection by the other partners, it may well be presumed that he was authorised to do so. There is no reason why we should go further and require an express authority treating the implied authority as useless for the purpose of S. 21.

S. 21 is similar in language to section 14 of the Mercantile Law Amendment Act of 1856 which has received judicial interpretation in England so far as partners are concerned. The following passage from Lightwood (Time Limit to Actions) correctly summarises the law in England on the subject. "Though the doctrine of implied agency as between co-debtors is abolished one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary one partner is presumed to be the agent of the other to make payments in respect of partnership debts (*Goodwin* v. *Parton* [1]) and though the agency is in general terminated by a dissolution of partnership (*Watson* v. *Woodman*, [2]) it may under special circumstances be treated as continuing where for instance the retirement of a partner is kept secret and payments of interest are made in the name of the firm, *In re-Tucker* [3].

I agree with the judgment in *K. R. V. Firm* v. *Seetharamaswami* [4], which deals fully with the English and Indian statutes and decisions and which is entirely in accordance with my experience of the consciousness of the mercantile community and the course of business usually followed. The same view has subsequently been taken in *Lalta Prasad* v. *Babu Prasad* [5] and in *Abdul Ali* v. *Ranchadlal* [6] and in *Karmali Abdulla* v. *Karimji Jiwanji* [7].

*V. Ramadoss* for Appellant:—Ss. 18 and 21 (2) of the Limitation Act govern the present section.

[*Seshagiri Aiyar, J.*:—Is there any decision which lays down that authority must be express?]

No. But there are certain dicta to that effect in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* [8], *Shaik Mohideen Sahib* v. *Official Assignee of Madras* [9].

1. (1879) 41 L. T. 91.
2. (1875) 20 Eq. 721.
3. (1894) 3 Ch. 429.
4. (1913) I. L. R. 37 Mad. 146.
5. (1909) I. L. R. 32 All. 51.
6. (1916) 19 Bom. L. R. 86 at p. 95.
7. (1914) I. L. R. 39 Bom. 261.
8. (1909) I. L. R. 32 M 421.
9. (1912) I. L. R. 35 M. 142.

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Kumaraswami Sastri, J.

(*Ayling, J.*—The evidence in those cases was not sufficient to lead to an inference of authority.)

Yes. If it is shown that the acknowledgment is an act necessary for and is usually done in the course of the partnership business, the authority is proved. Reference was made to S. 251 of the Contract Act, *K. R. V. Firm* v. *Seetharamasami* [1], *Muthusami Nadan* v. *Sankaralingam* [2] and *Chidambaram Chetti* v. *Ramaswami Chetti* [3].

(*Coutts-Trotter, J.*:—The acknowledgment coupled with the fact that the person acknowledging is the active managing partner of the firm or the manager of a Joint Hindu family may lead to an inference of authority.)

The arguments in favour of my contention are found in *K. R. V. Firm* v. *Seetharamasami* [1] and the order of reference. The other High Courts have taken the same view. *Lalta Prasad* v. *Babu Prasad* [4], *Kishan Prasad* v. *Har Narain Singh* [5], *Abdullali* v. *Ranchodlal* [6]. Reference was also made to, *Chandooru Punnaya* v. *Sree Venugopala Rice Co. Ltd.* [7] and *Read* v. *Price* [8].

(*Coutts-Trotter, J.*:—The Indian Limitation Act unlike Lord Tenterden's Act, makes special reference to partners but I suppose the intention is the same.)

Yes. See *K. R. V. Firm* v. *Seetharamasami* [1]. Reference was made to *In re Tucker* [9] and *In re Macdonald*: *Dick* v. *Fraser* [10].

(*Coutts-Trotter, J.*;—The English cases only go so far as this: It won't do for you merely to put in a piece of paper purporting to be an acknowledgment by a partner and then say without proof of anything more, that it is binding on the partnership).

It would be a valid acknowledgment if it was necessary for and usually done in the course of business.

*T. Ramachandra Rao* for the respondent referred to *Veerappa Chetti* v. *Chidambaram* [11] and *Kothandaraman Chetti* v. *Shunmugam Chetti* [12].

1. (1913) I. L. R. 37 M. 146.
2. (1914) 18 M. L. T. 273.
3. (1914) 27 M. L. J. 631, 634.
4. (1909) I. L. R. 32 A. 51.
5. (1910) I. L. R. 33 A. 272.
6. (1916) 19 Bom. L. R. 86, 95, 96.
7. (1917) 7 L. W. 114.
8. (1909) 2 K. B. 724, 735.
9. (1894) 3 Ch. 429.
10. (1897) 2 Ch. 181, 188.
11. (1914) 28 I. C. 845.
12. (1915) 32 I. C. 608.

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The Court expressed the following

**Opinion**:—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute-barred in the absence of an acknowledgment sufficient, within S. 19 of the Limitation Act, to take it out of the statute. There is such an acknowledgment, but it is only signed by the 1st defendant, the father, and the question is whether it can operate as against the son, the co-defendant also.

The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* [1] and *Skaik Mohideen Sahib* v. *The Official Assignee of Madras* [2] did not preclude them from arriving at the conclusion which they clearly thought to be the right one.

The exact question propounded is: "whether in the absence of direct evidence that a co-contractor or partner has authorised his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other surrounding circumstances such as the position of the other co-contractors or partners in the business." Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from circumstances though it is of course quite beyond our province to indicate what circumstances should in our opinion be deemed sufficient to warrant the inference. It is important to notice the exact wording of S. 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a

1. (1908) I. L. R. 32 Mad 421. 2. (1911) I. L. R. 35 Mad. 142.

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conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary course of partnership business. We need only refer to the general principle of law embodied in S. 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Shaik Mohideen Sahib* v. *The Official Assignee of Madras* [1] lends colour to that view. White, C. J. referring to the former decision in *Valasubramania Pillai* v. *S. V. R. R. M. Ramanathan Chettiar* [2] says "Following the principle we here (*i. e.*, 32 Mad. 421) lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm." Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so, we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

A. V. V.

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1. (1911) I. L. R. 35 Mad. 142 at p. 145. 2. (1908) I. L. R. 32 Mad. 421.

THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT :—MR. JUSTICE AYLING, MR. JUSTICE COUTTS TROTTER, AND MR. JUSTICE SESHAGIRI AIYAR.

Chidambara Pillai ... *Appellant** (*Plaintiff.*)

*v.*

Subbayya Pillai and others ... (*Defendants* (*Respondents*). *Nos. 2 to 18 and 20 to 40.*.

*Hindu Law—Testamentary guardian—Appointment of, by father or manager in respect of co-parcenary property of minor members, if valid*

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Under the Hindu Law, it is not competent to the only adult co-parcener of a Mitakshara joint family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners.

Authorities on the subject considered.

Appeal against the decree of the court of the Temporary Subordinate Judge of Tanjore in Original Suit No. 3 of 1913.

This Appeal came on for hearing on Friday the 31st day of August, 1917.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.* :—This appeal arises out of a suit filed by the appellants against the 1st defendant and several others for an account of the management of their properties by the 1st defendant during their minority and for the setting aside of the alienations made by him in favour of the other defendants. The case of the plaintiffs is that one Chidambaram Pillai died leaving two undivided sons, Ramasami Pillai, the father of the 4th plaintiff and Appukutti Pillai, the father of the 1st, 2nd and 3rd plaintiffs. Ramasami Pillai died in 1900 and Appukutti Pillai in 1902. At the time of Appukutti Pillai's death all the plaintiffs were minors and he was the only adult member of the undivided family. He left a will dated the 6th October 1902. The material portion of the will runs as follows :—"As my sons and my elder brother's sons are minors, I have appointed Venkatachella Pillai son of Theagaraja Pillai of Puduputhur, Negapatam Taluk, executor herein having requested him regarding the management of the affairs for the purpose of looking after all the affairs of the family, after my death till the minors come of age, as he is a near relative of mine being maternal uncle and a reliable man who would faithfully look after the affairs and take pains in

* A. S. No. 84 of 1915. 20th February 1918.

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improving the property, ...... ................................If the creditors press for payment the lands in Orathu Kannur Vattam, Vadakathalai village shall be sold to him who wants the same. The properties after paying up the debts shall be added to the family property."

This defendant who was appointed executor took possession of the estate and made the alienations complained of in the plaint. The 1st plaintiff attained majority in 1908 and the 1st defendant is alleged to have severed his connection with the estate and to have put him in possession of the properties that then remained. The alienations made by the 1st defendant are impeached on the ground that the will is invalid under Hindu Law and that there was no necessity for the alienations.

As the will on its face purports to deal with joint family properties it cannot confer any title on the 1st defendant so far as the properties are concerned, as S. 4 of the Probate and Administration Act expressly provides that no property which would otherwise have passed by survivorship shall vest in the executor or administrator.

It is argued that the will is valid in so far as it appoints the 1st defendant the guardian of the minor members of the undivided family and that under the terms of the will the appointment of the 1st defendant as executor and the conferring upon of the powers of management (set out in detail) amounted to his appointment as a testamentary guardian.

The question for determination therefore is whether a Hindu who is the only adult member of a co-parcenary consisting of himself, the sons and nephews, can appoint a testamentary guardian to his minor co-parceners.

So far as appointment of a guardian to the person of minors is concerned the power of a Hindu father is not disputed. In *Rev. Dr. Albrecht* v. *Bathee Jellamma* [1] Wallis, C.J., and Abdur Rahim, J., held following *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* [2] that a Hindu father was entitled to appoint a guardian for his child by will so as to exclude the mother from the guardianship. This decision was followed by Sadasiva Aiyar and Moore, JJ., in *Alagappa Iyengar* v. *Mangathai Ammangar* [3] where the learned Judges held that it was competent to a Hindu father to

1. (1911) 22 M. L. J. 247. 2 (1867) 7 W. R. 74
3. (1916) 30 M. L. J. 504.

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appoint a guardian by will to the person of his minor son though he could not do so in respect of undivided family properties.

As regards appointment of a guardian to the properties of minor co-parceners there is a conflict of authority. In *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh*[1] it was held that under Hindu Law the father has power to appoint either orally or by writing a person to be the guardian of his minor children.

The facts appearing in the report show that the parties were governed by the principles of Hindu Law current in Mithila where the Mitakshara is the leading authority though it is supplemented by the Vivada Ratnakara and the Vivada Chintamani. In dealing with the powers of the father, Loch, J. observed :—"We think the Principal Sudder Ameen has taken an erroneous view of the Hindu Law as regards the power of a parent to appoint a guardian for his children. No doubt the mother is the natural guardian of her child; and were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported ; but we are not aware of any provisions of the Hindu Law, nor have any such been shown in support of the Principal Sudder Ameen's view, which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children. The Principal Sudder Ameen has found the will to have been duly executed. If his finding in this respect be correct, the will, though inoperative as regards the disposition of the property which is contrary to the principles of the Hindu Law current in Mithila, is not so as regards the appointment of a guardian". The decision has not been questioned in any of the subsequent decisions and is clear authority for the proposition that a will though invalid as a disposition of property can be effective to create a testamentary guardian.

In *Bindaji* v. *Mathura Bai*, [2] Jenkins, C. J. and Aston, J. held that the principle that no guardian can be appointed to the property of a minor who is a member of a joint and undivided Hindu family and whose only property is his interest on the joint property does not apply to cases where all the members of the family are minors and that a testamentary guardian can be appointed subject to the limitation that it would be open to any minor on attaining majority to apply for the removal of the guar-

1 (1867) 7 W. R. 74. 2. (1905) I. L. R. 30 Bom. 152.

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dian so appointed. This case was followed in *Ramachandra* v. *Krishna Rao* [2]. In *Krishnappa* v. *Ramachandra Mangesh*, [2] Scott, C.J., and Beaman, J., after referring to *Soobah Doorga Lal Jha* v. *Raja Neelanund Singh*,[3] and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* [4] were of opinion that it was competent to a Hindu father to appoint a testamentary guardian to the property of his minor children and to give directions for management.

A contrary view however has been taken in *Kanagasabhai Mudaly* v. *Ponnusami Mudali*[5], by Sadasiva Aiyar and Spencer, JJ. The appeal arose out of an application to remove a guardian who purported to act as guardian appointed by a will of the father of a certain minor.

It appears from the report that Abdur Rahim and Spencer, JJ. without expressing any opinion called for a finding as to whether the properties dealt with by the will were ancestral or self-acquired. On receipt of the finding Sadasiva Aiyar and Spencer, JJ. observed as follows: "On the finding that the properties are ancestral properties of the testator (petitioner's father) he had no right to appoint guardians by will in respect of such properties which survived to his sons" and treated the guardian as a "mere trespasser". No authorities seem to have been cited at the bar and the judgment does not refer to or discuss any of the previous authorities on the subject.

In *Krishna Aiyar* v. *Chakrapani* [6] Mr. Justice Oldfield was of opinion that a testamentary guardian was not a person "appointed by a competent authority" within the meaning of Order 32, Rule 6 (2) of the Civil Procedure Code so as to entitle him to draw moneys from Court without giving security. The learned Judge simply followed *Kanagasabhai Mudali* v. *Ponnusami Mudali* [5] and *Budhlal* v. *Morarji* [7].

The question again arose for decision in *Alagappa Iyengar* v. *Mangathai Ammangar* [8]. Mr. Justice Sadasiva Iyer who delivered the judgment of the Court was of opinion that though a Hindu father can appoint a testamentary guardian to the person of his minor sons, he was incompetent to appoint a guardian to the joint family properties which on his death survived to his minor sons. The learned Judge after referring to *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* [3] and distinguishing *Rev. Dr. Albrecht* v.

1. (1908) I. L. R. 32 Bom. 259.
2. (1913) I. L. R. 38 Bom. 94.
3. (1867) 7 W. R. 74.
4. (1869) 13 M. I. A. 209.
5. (1913) 21 I. C. 848.
6. (1915) 29 I.C. 475.
7. (1907) I. L. R. 31 Bom. 413.
8. (1916) I L.R. 40 Mad 672=30 M.L.J. 504.

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*Bathee Jellamma* [1] as only deciding that it was competent to a Hindu father to appoint testamentary guardian (though the decision followed without reservation the broader rule laid down in *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* [2] preferred and followed the decision in *Kanagasabhai Mudali* v. *Ponnusami Mudali* [3].

In Second Appeal No. 73 of 1916 (*Chidambaram Pillai* v. *Veerappa Chettiar* [4],) the question again came up for consideration before Justices Sadasiva Iyer and Spencer and they differed as to the testamentary capacity of the father to appoint a guardian to the properties of his minor sons. Sadasiva Iyer, J., after distinguishing the cases in *Soobah Doorgah Lal Jah Raja Leelanund Singh* [2] and *Raj Lukhee Debia* v. *Gokul Chander Chowdhry* [5] as being cases under Dayabhaga Law and *Ramachandra* v. *Krishna Rao* [6] as being a case deciding the power of courts to appoint, dissented from the decision of the Bombay High Court in *Mahableshvar Krishnappa* v. *Ramachandra Mangesh* [7]. Spencer J. after referring to the conflict between the Bombay and Madras views was inclined to follow *Ramachandra* v. *Krishna Rao* [6] and *Mahableshvar Krishnappa* v. *Ramachandra Mangesh* [7]. He observed that there might be exceptional cases where a Hindu father may validly and properly appoint by will a guardian to manage the joint family property during the minority of his sons where he was the only adult male member of the coparcenary at the time of his death, such an act being "a natural act on the part of a prudent Hindu father dying without grown up sons or agnates".

I can find nothing either in the Mitakshara or the Smritis which prohibits a father from providing for the care and management of property during the minority of his sons. The only possible ground for negativing the power of a Hindu father governed by the Mitakshara to exercise his natural right (conferred by every civilized system of jurisprudence) to make provisions for the care and custody of properties of his minor children on his death, is that under the Mitakshara he cannot dispose of property by will to the prejudice of his coparceners, but I do not think that arrangements made for the protection of property for the benefit of minors amount to a disposition of property or a disturbance of

1. (1911) 22 M. L. J. 247.
2. (1867) 7 W. R. 74.
3. (1913) 21 I. C. 848.
4. (1917) 6 L. W. 610.
5. (1869) 13 M. I. A. 209.
6. (1903) I. L. R. 32 Bom. 259.
7. (1913) I. L. R. 38 Bom. 94.

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the rights of the minor co-parceners to take the property by survivorship. *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* [1], which as I have already pointed out is a case under the Mitakshara, clearly points out and recognises the distinction between a disposition of property contrary to the provisions of Hindu Law and an arrangement for its preservation and management. The limitation to the power of the testamentary guardian to the period when any one of the minors comes of age and so becomes competent to exercise his right of management which as an adult co-parcener he would have in a Mitakshara family so far as the other minor co-parceners are concerned, would effectually remove any conflict. The decision of the Privy Council in *Gharib Ullah* v. *Khalak Singh* [2] only prevents a Court and by a parity of reasoning, a father or other adult co-parcener from appointing a guardian to the property of minor members of a joint family where there is an adult co-parcener. *Bindaji* v. *Mathura Bai* [3] and *Krishnappa* v. *Ramachandra* [4] distinguish *Gharib-Ullah* v. *Khalak Singh* [2] on this ground and are clear authorities for the view that the decision in 30 I. A. 165 has no application when all the co-parceners are minors.

As observed by Scott, C. J. in *Krishnappa* v. *Ramachendra Mangesh* [4] and by Spencer, J. in his judgment in S. A. No. 73 of 1916 (*Chidambaram Pillai* v. *Veerappa Chettiar* [5]), it is a matter of practical convenience and necessity that a dying adult member of a co-parcenary where all the other co-parceners are minors should be able to make arrangements for the guardianship of the minors and the management of the co-parcenary property and I am of opinion that unless there is any *express prohibition* in the Hindu Smritis or commentaries recognised as authorities in this Presidency, there is no reason why the rulings of the Calcutta and Bombay High Courts should not be followed. In view of the conflict of authorities referred to by me between the Madras and other High Courts I think it desirable that the question should be settled by a Full Bench and would refer the following question for determination :—

Whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners

1. (1867) 7 W. R. 75.
2. (1903) L. R. 30 I.A. 165.
3. (1905) I. L. R. 30 B. 152.
4. (1913) I. L. R. 38 B. 94, 103.
5. (1917) 6 L. W 640.

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to appoint a testamentary guardian to the co-parcenary properties of the minor coparceners ?

*Wallis, C J.*:—I agree to this reference.

*K. Srinivasa Aiyangar* and *C. Krishnamachari* for appellant. The appointment of a guardian of property is really the delegation of the right of management which is an incident of property. If it is competent to a person to dispose of property by will, then *quod* that property, he can appoint a testamentary guardian. Ancestral property or joint family property is not at the absolute disposal of the father or manager, and the other members have an equal interest. If there are minors, they are entitled to have the property managed according to the law of the land. The appointment of testamentary guardian is, in effect, a disposal of one of the rights in property (*i. e.*) the right to manage. The fact that the father or mother is a guardian during their life-time does not enable them to delegate the power. In the case of self-acquired property the testator can delegate the management by will.

[*Seshagiri Aiyar, J* :—Is it your case that a guardian can be appointed by will only in a case of inheritance and not in cases where the property passes by survivorship.].

In every case in which a person has the absolute power of disposal of the property he can appoint a guardian. The Karnavan of a Malabar tarwad is in the same position as the manager of a joint Hindu Family except for the fact that he cannot claim a division. But a Karnavan can't appoint another Karnavan by will.

There is no provision of Hindu Law as regards the guardianship of the person or property not solely belonging to a minor. This is because it is the duty of the father or mother to take care of the children. There are provisions regulating guardianship in marriage but none concerning the guardianship of a minor. Reference was made to Manu Ch. VIII V. 27 ; Ch. IX Vs. 146, 190 and 191; and Colebrooke's Digest Vol. II pp. 575-577 , *Ranganaiki Ammal* v. *Ramanuja Iyengar* [1]. There is no provision as regards the guardianship of the person of a minor, for that is left to nature or nurture. As regards the properties of the minor, the king should take charge of it and manage. The decisions of this Court are all in my favour. *Kanagasabai Mudali*

1. (1911) I. L. R. 35 M. 728, 730.

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v. *Ponnusami Mudali* [1], *Krishna Iyer* v. *Chakrapani* [2], *Alagappa Iyengar* v. *Mangathayee Ammangar* [3], *Chidambaram Pillai* v. *Veerappa Chettiar* [4].

In *Soobah Doorgah Lal Jha* v. *Raja Leelanund Singh* [5], the point did not really arise. The report is obscure. The compromise might have been with reference to the self-acquired properties of the father. Moreover the guardian was also appointed as *guardian-ad-litem.* If the right claimed is a natural right, the mother also should be competent to appoint a testamentary guardian of the properties of the minor. *Raj Lukhee Dabea* v. *Gokul Chander Chowdhury* [6], was a Dayabhaga case and the testator was competent to dispose of the property. *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* [7], is wrongly decided. Reference was made to *Koovuri Therupathi Raju* v. *Venkata Raju* [8]; Decree of the *Sudder Dewany* (1847) N. W. P. 115.

In other systems of jurisprudence, provision is made by legislation for the appointment of a testamentary guardian. Otherwise the king, represented by the courts is the proper guardian of the property of minors. *Simpson on Infants*, pp. 105, 183; *American Cyclopædia*, Vol. 21, p. 12; *Domat's Civil Law*, p. 518. There is no such thing as a natural right to appoint a guardian for the property of minors.

*T. R. Ramachandra Aiyar*: Guardianship is not a thing which runs with property. The mother is a natural guardian of the property of a minor. Both the Hindu Law and Indian legislation recognise this power of parent. Reference was made to Strange's Hindu Law, page 72 (a); Hindu Widow's Re-marriage Act, S. 3; Regulation V of 1804, Ss. 18 and 19; Shyama Charan's Vyavastha Darpana, p. 406. Kullaka's gloss on Manu, clearly shows that the king takes charge of property of minors who are "anadha" and not of properties in respect of which a manager has been appointed. There is no prohibition in the Hindu Law or in Indian legislation against the appointment of a guardian to the properties of a minor co-parcener. It is a natural right of the father. For instance, the father can give away his son in adoption, depriving him of his rights in its natural family. The

1. (1913) 21 I C 848.
2. (1915) 29 I. C. 475.
3. (1916) I. L. R. 40 M. 672.
4. (1917) 6 L. W. 640.
5. (1867) 7 W. R. 74.
6. (1869) 13 M. I. A. 209.
7. (1913) I. L. R. 38 B. 94.
8. (1917) 40 I. C. 418.

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father has a special power. The cases in all the other High Courts are in my favour. Reliance was placed on *Raj Lukhee Debea* v. *Gokul Chaunder Chowdhry* [1], *Soobha Doorgah Lal Jha* v. *Raj Neelanund Singh* [2], *Bindaji* v. *Mathurabai* [3], *Krishnappa* v. *Ramachandra Mangesh* [4]. The decision in *Alagappa Iyengar* v. *Mangathayi Ammangar* [5] erroneously assumes that *Soobha Doorgah Lal Jha* v. *Raja Leelanund Singh* [2] was a Dayabhaga case. The testamentary guardian was appointed *guardian-ad-litem* in the case, the preference being based on the validity of such an appointment. Reference was also made to *Gharib-Ullah* v. *Khalak Singh* [6] and *Sami Row* v. *Eliavatha Row* [7]. It is anamolous to hold that for the self-acquired properties, the father can appoint a testamentary guardian, while for the other properties there must be a guardian appointed by court, though according to the strict letter of the Mitakshara the son acquires an interest by birth in both. Reasons of convenience and natural justice are in favour of the validity of such an appointment.

*C. Krishnamacharri* replied.

The Court expressed the following

Ayling, J

**Opinion** :—*Ayling, J.* :—I have had the advantage of perusing the judgment which my learned brother, Seshagiri Aiyar, J. is about to pronounce ; and I agree in the conclusion arrived at by him. It is impossible to contend that the power of appointing a testamentary guardian is supported by anything in the ancient texts ; and the attractive doctrine that anything which is not expressly forbidden should be held lawful, if expedient, seems to me one, which has its dangers, and requires careful consideration before application. In the present case, the power claimed seems to run counter to the conception of a Hindu joint family in which every member obtains an interest at birth. I can only agree with Sadasiva Aiyar, J's remark in *Chidambaram Pillai* v. *Veerappa Chettiar*,[8] in which that learned Judge says,

"On principle I find it difficult to hold that a man who cannot deal with a particular species of property by will can make arrangements for the management of that property by will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death."

1. (1869) 13 M. I. A. 209.
2. (1867) 7 W. R. 74.
3. (1905) I. L. R. 30 B. 152.
4. (1913) I. L. R. 38 B. 94.
5. (1916) I. L. R. 40 M. 672.
6. (1903) I. L. R. 25 A. 407=L. R. 30 I. A. 165.
7. (1905) 16 M. L. J. 357.
8. (1917) 6 L. W. 640.

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This seems to me to sum up the whole matter.

I am not even clear that considerations of general expediency support respondents' contention. The reference covers the case, not only of the adult co-parcener's own minor sons, but of his minor nephews, and even minor brothers regarding whom the natural right of a father discussed by Kumaraswami Sastri, J. in his order of reference can have no application. Even as regards sons, I think the interests of the minors are sufficiently protected by power of the Court to appoint a guardian and while the expressed wishes of the father are sure to receive attention at the Court's hands, nothing further is required.

I would answer the question in the negative.

Coutts Trotter, J.

*Coutts Trotter, J.*:—I also have had the advantage of perusing my learned brother Seshagiri Aiyar's judgment. I only abstain from simply expressing my own concurrence in it, because my doing so might seem to be associating myself with a familiarity with the ancient authorities which I cannot pretend to possess. I therefore put what I have to say in my own words.

To speak of natural rights has always been recognised as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be a 'natural' right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may be, seems to me, to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretended that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the king, which in modern language means the courts of the country. No case has been cited which can be said to recognize the suggested right. The case in *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* [1] contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Aiyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint

1 (1867) 7 W. R. 74.

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properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That again seems to me to be lapsing into abstract speculation, and it may be that Mr. T. R. Ramachandra Aiyar's attack on this theory—which not insignificantly formed almost the whole of his argument—was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient; it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the legislature to take action. They cannot in my opinion suffice to set in motion a court of law.

Seshagiri Aiyar, J.

*Seshagiri Aiyar, J.*:—The question referred for our consideration is whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners.

It was argued before us that the real point for decision is whether the manager of a Hindu family, be he the father, the uncle or an elder brother can appoint a testamentary guardian for the property of his minor co-parceners. In the Hindu law there is no provision for the appointment of a testamentary guardian. That may be due to the fact that the idea of making a will is of recent origin. The only texts of Hindu law which relate to this subject are all collected in Colebrooke's Digest, vol. II pages 574 to 577. These authorities cast upon the king the duty of protecting the property of a minor.

Mr. T. R. Ramachandra Aiyar for the respondents drew our attention to the commentary of Kullookha Bhatta on Manu's text and argued that the protection of the king should be invoked only where the infant was otherwise unprotected. I do not understand the commentator to indicate by the use of the expression '*Anadha*' that the deceased father or manager is competent to appoint a guardian and that it is only in default of such an appointment the king can step in. On the other hand it is clear from Manu's verses that the primary right of guardianship is in the king, and it is only by reflection that the father during his

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life time exercises that right (as if by delegation by the sovereign).

On principle, it appears to me that a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death. However convenient it may be and however consonant with natural justice that a father or manager should indicate his preference of an individual as guardian by a testament, in my opinion it would be inconsistent with the theory of survivorship that he should have the power to dictate to the king or to the Judges appointed by him as to who should be the guardian of his minor co-parceners. In the majority of cases the wishes of the father or manager would be acted upon by the courts. But to that his directions should be regarded as amounting to a legal appointment is opposed to the principle underlying the Mitakshara system of law.

In the order of reference Mr. Justice Kumaraswami Sastriar refers to the natural right of a father to appoint a guardian and says that such a power is conferred by every civilised system of jurisprudence. Mr. K. Srinivasa Aiyangar in a very learned argument has drawn our attention to the theories of guardianship enunciated in the ancient and modern systems of jurisprudence. An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the nurtural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a common law right. In Roman law just as in the Hindu law the protection of property was enjoined upon the state. In English law the power to appoint a testamentary guardian was first given by 12, Carl. II C. 24. (See Simpson on Infants, page 105). It is stated in the text book that the right of appointing a testamentary guardian is not a common law right. In America where the Civil Law of Rome and the English Law have been further developed, it is clear that the right of appointing a testamentary guardian is not regarded as an inherent right in the parent. (See 21, American Cyclopeadia, page 12). Therefore I am unable to accept the statement of the learned Judge that in other systems of jurisprudence the right of appointing a testamentary guardian exists as a common law right in the parent.

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I shall now discuss the cases. The earliest decision upon the subject, barring the decision of the Sudder Adawlat of the High Court of the N. W. Provinces, is *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* [1]. There are undoubtedly, observations in that judgment which show that the learned Judge believed that he had the authority of the Hindu law in holding that a testamentary guardian can be appointed for a Mitakshara minor. The actual decision itself it supportable upon other grounds. There were two classes of property in respect of which a person purporting to act on behalf of the minor had entered into a compromise on behalf of the minor. This person was appointed guardian by the father in his will; he was also recognised by the civil court as the guardian *ad litem* of the minor. The compromise in the suit related to ancestral property. It was upheld. It is well settled that where a guardian is appointed by the court and an honest compromise is come to in presence of the court it is *primá facie* binding upon the minor unless the latter can show that his guardian was guilty of fraud or other invalidating circumstance. There was another species of property in regard to which the guardian appointed by the will had entered into a compromise outside the court. That property was the self-acquisition of the father. In respect of such property, it can hardly be disputed that it is open to the testator to appoint a guardian to manage it. Therefore the conclusion come to in the case is right. The observations of the learned Judge that Hindu law sanctions the appointment of a guardian receive no support from any citation made by him or from any authority to which we have been referred in the course of the argument in this case, I am therefore not prepared to follow the obiter dicta contained in that judgment.

The next case very strongly relied upon by Mr. T. R. Ramachandra Aiyar is the decision of the Judical Committe in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* [2]. It was a case under the Dayabagha law under which it was competent to a father to dispose of property notwithstanding the existence of sons. The suit was brought to set aside the alienation made by the widows of one Guruprasad Sarma. The latter had executed a document in favour of the widows under which the alienees claimed that the widows had ample power of disposition. The Judicial Committee came to the conclusion that the document conferred no rights of

1. (1867) 7 W. R. 74. 2. (1869) 13 M. I. A. 209.

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property on the widows. They regarded it as providing only "a species of trust for management and that it did not interfere with the devolution of the estate according to the ordinary law of succession under the Hindu law." Following this view, their Lordships of the Judicial Committee considered whether the disposition by the widows as managers of the property of Guruprasad's sons was impeachable. It is clear from the facts that the question before the Committee did not relate to co-parcenary property or to the power of a Mitakshara father to appoint a testamentary guardian. Notwithstanding the argument of the learned vakil for the respondents, I am unable to see why a person who is competent to devise his property whether to his own children or to strangers should not deal in his testament only with the right of management of that property. It is not necessary to validate such an appointment of a guardian or manager that the testament should make a gift of the property as well. The right over property involves two definite rights, the right of management, and the right of enjoyment. A person may devise the right of management only by providing that his legal heirs shall have the benefit and advice of a person in whom the testator had confidence. That was really what happened in the Bengal case. Sir James Colville in delivering the judgment, points out that the right of succession under the Hindu law was not interfered with by the testator. I see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property. *Mahableshwar Krishnappa* v. *Ramachandra Mangesh* [1] was the next case referred to. I cannot help saying that the learned Judges have not correctly understood *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* [2] on which they base their conclusion; I feel constrained to differ from the decision. These are all the cases in the other High Courts. So far as Madras is concerned the preponderance of authority is in favour of holding that a Mitakshara father has no power to appoint a testamentary guardian to his sons' property; *a fortiori* a Mitakshara manager has no power to appoint such a guardian. The first decision is *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* [3] to which Mr. Justice Spencer was a party. *Krishna Aiyar* v. *Chakrapani* [4] is to the same effect. In *Alagappa*

1. (1918) I. L. R. 38 Bom. 94.
2. (1869) 13 M. I. A. 209.
3. (1913) 21 I. C. 848.
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*Ayyangar* v. *Mangathai Ammangar* [1] Mr. Justice Sadasiva Aiyar and Mr. Justice Moore came to the same conclusion. In *Chidambaram Pillai* v. *Veerappa Chettiar* [2] Mr. Justice Sadasiva Aiyar once again expressed the same view. Mr. Justice Spencer seems to think that the matter requires further consideration. The learned Judge does not give any definite opinion on the point at issue. Mr. T. R. Ramachandra Aiyar attacked the view of Mr. Justice Sadasiva Aiyar on two points. I do not think that the criticism really affects the main conclusion at which the learned Judge has arrived. It is true that his reference to *Soobha Doorga Lal Jha* v. *Raja Neelanund Singh* [3], as a Dayabagha case is not quite accurate, and something may be said also against his reference to the Privy Council decision, but the principle enunciated by him has my entire approval.

Some other cases were referred to by Mr. T. R. Ramachandra Aiyar, *viz.*, *Sami Row* v *Hayavatha Row*, [4] and *Gharib Ullah* v. *Khalak Singh* [5]. In the first of these cases the property dealt with was the self-acquired property of the testator. The second case has really no bearing upon the point. The learned vakil referred to the enactments dealing with guardianship, *viz.*, the Court of Wards Regulation, the Guardians and Wards Act and the Widow Re-marriage Act and contended that these legislative provisions preserve the right of a Hindu father to appoint a guardian. I do not think these Acts give any statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or Dayabagha property in Bengal.

The case has been very fully argued by the two learned vakils, and my answer to the question referred to us is in the negative.

A. V. V.

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1. (1916) I. L. R. 40 Mad. 672.
2. (1917) 6 L. W. 640.
3. (1867) 7 W. R. 74
4. (1906) 16 M. L. J. 357.
5. (1903) I. L R. 25 All. 407 (P. C.)

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE PHILLIPS.

Srinivasa Upadya ... *Appellant** (*Plaintiff.*)

*v.*

Ranganna Bhatta (dead) and others ... *Respondents* (*Defendant and his Legal Representatives*).

Srinivasa Upadya v. Ranganna Bhatta

*Easements Act, S. 15—Easement—Acquisition, by prescription—Servient tenement owned by Government—Exercise of easement in respect of, for 30 or 40 years—Assignment of property by Government to private individual—Effect on rights of parties—" Belongs to Government" in last para—Meaning.*

The words " belongs to Government " in the last paragraph of S. 15 of the Easements Act refer, not to the time of suit, but to the time during which the easement is enjoyed.

Where, property belonging to Government and in respect of which an easement had been exercised by A only for 30 or 40 years, was assigned by Government to B, a private individual, *held* that the assignment had not the effect of rendering the easement absolute as against B on the ground that the 30 or 40 years' enjoyment would be sufficient as against him under S 15 of the Act.

*Semble*, Where the 60 years' period has nearly expired, during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee.

Second appeal against the decree of the District Court of South Kanara in A. S. No. 286 of 1915 preferred against the decree of the Court of the District Munsif of Udipi in O. S. No. 126 of 1914.

*K. Y. Adiga* for *B. Sitarama Row* for Appellant.

*K. Sundara Row* for Respondents.

The Court delivered the following

**Judgment** :—The subject of dispute is an easement claimed as acquired by prescription. The servient tenement belonged to Government till 2 years before suit and was then assigned by Government to the defendant. At the time of assignment the easement had been exercised only for 30 or 40 years and had therefore not become absolute as against Government. Appellant contends that the transfer of ownership had the effect of rendering it absolute inasmuch as the servient tenement became the property of a private individual against whom the previous 30 or 40 years' enjoyment would be sufficient under S. 15 of the Easements Act.

* S. A. No. 1098 of 1916. 29th November, 1917.

Srinivasa Upadya v. Ranganna Bhatta.

The point is a novel one and is not covered by authority. But we think appellant's contention cannot be admitted. We think the words "belongs to Government" in the last paragraph of section 15 must refer, not to the time of suit, but to the time during which the easement is enjoyed. An easement can only be acquired by 20 years' enjoyment against a private person or by 60 years' enjoyment against Government. Here neither condition is satisfied. It may be that where the 60 years' period has nearly expired during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee, but subject to this the person claiming the easement must make good his title by 20 years' enjoyment against the transferee after the transfer.

If we adopt the view contended for by the appellant, we should have to hold that the transfer of the servient tenement by a private owner to Government would have the effect of destroying any easement right, which had been legitimately acquired by 20 years' enjoyment; but which had not been enjoyed for the period of 60 years required as against Government.

This appeal is dismissed with costs.

A. S. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE SADASIVA AIYAR.

P. Narayan Nair and others ... *Petitioners* (Defendants Nos. 1, 2 & 4 to 7).*

v.

A. P. M. Cheria Kathiri Kutty ... *Respondent (Plaintiff.)*

Narayan Nair v. Cheria Kathiri Kutty.

*Practice—Plaint returned by the Munsiff to be presented to the proper Court. Subsequent filing of the plaint in the Sub-Court-Appeal against the order of the Munsiff, whether forfeited by filing the plaint in the Sub-Court-Valuation of suit-Suit to enforce right of pre-emption—Suits Valuation Act Ss.* 3 (1) *and* (6)*—Cour Fees Act, S.* 7 (5) *and* (6)*—Madras Civil Courts Act, S.* 14*—Suit to be valued under S.* 7 (5).

Where the District Munsiff ordered the return of a plaint and the plaint was afterwards filed in the Subordinate Court and it was returned again, and the plaintiff appealed against the Munsiff's order of the return of the plaint, the plaintiff does not forfeit his right of appeal by electing to file his plaint in the Subordinate Court.

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* C. R. P. No. 519 of 1917. 1st February 1918.

Narayan Nair v. Cheria Kathiri Kutty.

A suit to enforce a right of pre-emption of land is a suit the subjectmatter of which is land within the meaning of S.14 of the Suits Valuation Act and should be valued for the purposes of jurisdiction in the manner provided for by the Court Fees Act, S.7 (5).

Petition under S. 115 of Act V of 1908, praying the High Court to revise the judgment and order of the District Court of North Malabar in C. M. A. No. 4 of 1917, preferred against the order of the Court of the Additional District Munsif of Tellichery in O. S. No. 36 of 1916.

*K. P. M. Menon* for the Petitioner.

*C. Madhavan Nair* and *P. Appu Nair* for the Respondent.

The Court delivered the following

**Judgment**:—The plaintiff, respondent, first filed his plaint in the District Munsif's Court. When it was returned, he filed it in the Subordinate Court and it was returned again. He appealed to the Lower Appellate Court against the order of return by the District Munsif; and the first question is whether by electing to file his plaint in the Subordinate Court, he forfeited his right of appeal. It has been held that he could do so in *Beni Madhab Das* v. *Jotendra Mohan Tagore* [1]. But that decision was doubted in *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* [2] and was dissented from by one of us and another learned judge of this Court in A. A. O. No. 403 of 1914. We do not find in Order XLI or XLIII of the Civil Procedure Code any recognition of the principle that any such election as may have taken place in the case before us affects the right of appeal. We therefore hold that an appeal lay to the Lower Appellate Court.

On the merits the question is whether a suit to enforce a right of pre-emption should be valued for the purpose of jurisdiction with reference to the gross value of the property or otherwise, the Lower Appellate Court having held that it should be valued with reference to the net value after the amount of encumbrances on it has been deducted. Under S. 3 (1) Suits Valuation Act (VII of 1887) Local Governments are empowered to make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court Fees Act, S. 7 (vi); and suits such as that before us are so mentioned. Under S. 6, when such rules are made, S. 14 in Madras Civil Courts Act (III of 1873), is to be deemed repealed.

1. (1907) 5 C. L. J. 580.

2. (1908) 7 C. L. J 547, 556.

Narayan Nair v. Cheria Kathiri Kutty.

S. 14, no doubt refers to the subject matter of suits for land etc. But it is not in our opinion possible to accept the argument that subject-matter includes only immediate rights to possession and not such rights relating to land as pre-emption, when the contrary is indicated clearly by the last mentioned provision of the Suits Valuation Act. We therefore hold that the proper valuation is in accordance with S. 14 of the Madras Civil Courts Act that fixed in the manner provided by the Court Fees Act S. 7 (v). It is not disputed that so valued the suit will be within the District Munsif's jurisdiction. We therefore agree with the District Judge's decision and dismiss the petition with costs.

C. A. S.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Govindasami Pillai ... *Appellant* * (*Petitioner in C. R. P. No.* 887 *of* 1916 *on the file of the High Court-Petitioner.*)

v.

The Municipal Council, Kumbakonum. ... *Respondent (Respondent in the said C. R. P. No. Respondent.)*

Govindasami Pillay v The Municipal Council, Kumbakonum.

*Civil Procedure Code, Order* 33 *Rule* 5 (*d*)—*Application for permission to sue as a pauper—Doubtful question of limitation—Decision on, whether permissible.*

Order 33 Rule 5 (d) applies only to causes where the allegations of the petitioner do not show a cause of action and this should appear clearly on the face of the petition.

The Court is not justified in determining a doubtful question of limitation or hold an elaborate enquiry into doubtful and complicated questions of law at the stage contemplated by Order 33 Rule 5.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Honourable Mr. Justice Spencer dated 27th March 1917 in C.R.P. No. 887 of 1916 † praying the High Court to revise the order of the court of the Principal District Munsif of Kumbakonam dated 5th February 1916 in O. S. No. 1251 of 1915.

*K. Ramachandra Aiyar* for Appellant.

*N. Rajagopala Chariar* for Respondent.

The court delivered the following

JUDGMENT :—We are of opinion that the District Munsif was not justified in determining a question of limitation as to

* L. P. A. No. 74 of 1917. 27th November, 1917.

† See 33 M. L. J. 577 for the report of the Judgment in C. R. P. 887 of 16.

Govindasami Pillay v. The Municipal Council, Kumbakonum.

which there has been considerable difference of judicial opinion upon an application to sue in forma pauperis. Order 33, rule 5 (d) applies only to cases where the allegations of the petitioner do not show a cause of action, and we think that this should appear clearly upon the face of the petition.

We have been referred to cases where it was held that the court can go into the question of limitation to see if the petitioner has a subsisting cause of action. The cases do not decide that an elaborate enquiry into doubtful and complicated questions of law should be raised at the stage contemplated by Or. 33, R. 5. The pauper has no right of appeal if the decision on the question of law is wrong. We do not think it necessary to decide the question of limitation at this stage. This should form the subject-matter of an issue.

In the present case, moreover, the question of limitation may depend upon the construction of the contract between the parties, and it is possible that other evidence may be admissible as to the rights of the parties to the deposit made by the applicant, and we think that such matters should not be considered by the court at this stage.

The appeal is allowed, the order of the District Munsif is set aside and the petition is remanded for disposal according to law. The costs in the Civil Revision petition No. 887 of 1916 and this Letters Patent Appeal will abide the result of the suit.

C. A. S.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.
## FULL BENCH.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR, AND MR. JUSTICE SPENCER.

Pazhavathil Mavilaputhia Veetil Chindan Nambiar ... *Appellant** 1st (*Defendant.*)

*v.*

Kunhi Raman Nambiar and others ... *Respondents Plaintiffs* 1, 4, 5, 6, 8 *to* 18, 21, 22 *and* (*Defendants* 4, 5, 8 *to* 16, 18 *and* 19.).

F. B.

Chindan Nambiar v. Kunhi Raman Nambiar.

*Malabar law—Family Karar—Removal of then Karnavan and appointment as Karnavan of then senior anandravan—Effect—Status and rights of new Karnavan-Suit for his removal on ground of misconduct — Maintainability — Removed Karnavan left with some of rights of Karnavan—Effect.*

* S. A. No. 1177 of 1916. 4th March 1918.

F. B.

Chindan Nambiar v. Kunhi Raman Nambiar.

A suit lies for the removal of a Karnavan recoginsed as such by a family Karar.

Where by a Karar to which all the members of the tarwad were parties, the Karnavan for the time being was removed from the general management and the senior anandravan for the time being was constituted the Karnavan, though the removed Karnavan was allowed to manage a family temple and its income, *held*, in a suit for the removal of the newly constituted Karnavan, that the Karar had the effect of putting an end to the tenure of office of the removed Karnavan and the appointment of the newly constituted Karnavan, that the supercession of the removed Karnavan's rights by the Karar could not be affected by any subsequent unilateral act or expression of intention on his part, and that the newly constitute Karnavan became a de jure Karnavan and could be removed by suit for gross misconduct. *Cheria Pangi Achan* v. *Unnalachan* [1] distinguished.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry in Appeal Suit No. 535 of 1913 preferred against the decree of the Court of the District Munsif of Taliparamba in Original Suit No. 39 of 1910.

When the case came on hearing in the first instance the Court (Seshagiri Aiyar and Napier, JJ.) made the following.

ORDER OF REFERENCE TO A FULL BENCH:—

This is a suit to remove a karnavan. The Courts below directed his removal. Mr. Anantakrishna Aiyar for the appellant contested the findings regarding the charges framed against the Karnavan. There is evidence to support the findings and we are not prepared to differ from the courts below on these points. The next contention was that, even if the charges are proved, they are not serious enough to entail the removal of the karnavan. One of them which relates to the assignment of a satisfied decree to the 16th defendant, the son of the karnavan, to enable the said defendant to bring tarwad properties to sale is a very serious one. Both the Courts below have found that the conduct of the karnavan in this respect was fraudulent. Other charges also have been proved against him. They are all detailed in the judgments of the courts below. We think that taking them all together, there is enough justification for the decree passed in the case.

Mr. Anantakrishna Aiyar relied on *Cheriya Pangi Achan* v. *Unnalachan*,[1] and contended that the suit was not maintainable, as the 1st defendant was not the *de jure* karnavan, but was appointed to his position by a family karar. The facts necessary to understand this contention are these :—The 3rd defendant (who has since died) was senior in age and was the *de jure* Karnavan. He was removed by a karar. Then the 2nd defendant, who is also

1. (1917) 32 M. L. J. 323.

F. B.

Chindan Nambiar v. Kunhi Raman Nambiar.

now dead and who was next in age, was in management. During this period, the members of the Tarwad were dissatisfied with the way the affairs were being conducted. Therefore there was a family council and Exhibit B dated the 17th May 1892 came into existence. All the members of the Tarwad were parties to that document. By its terms, the 2nd defendant was removed from the general management and the 1st defendant who was admittedly the senior anandravan was constituted the karnavan. The 2nd defendant was allowed to manage a family temple and to utilise the surplus income for his maintenance. The result of the karar was that the 2nd defendant, the karnavan, was substantially removed from his office and his duties were entrusted to the 1st defendant. As both the defendants were parties to this karar, it was argued that the 2nd defendant must be deemed to have renounced his rights by his assenting to it. The decision in *Kenath Puthen Vettil Tavazhi* v. *Narayanan* [1] on which Mr. Ramachandra Aiyar relied, seems to enunciate the following propositions :—(*a*) The renunciation by a karnavan is binding on the tarwad and is irrevocable by him, (*b*) this renunciation may be by a unilateral act or by being a party to the contract by which his rights are superceded, and (*c*) by such renunciation, the next in age becomes the karnavan *de jure*. Applying these conclusions to the present case, it may be said that the 1st defendant who was the senior in age after the 2nd defendant became the *de jure* karnavan by virtue of the renunciation implied by the karar. It is true that some powers which ought ordinarily to have been exercised by the karnavan were entrusted to the 2nd defendant. This may be taken to have entailed some restrictions on the full powers of the 1st defendant. In other respects his rights as karnavan were recognised and confirmed by the karar. If this is the correct view of Exhibit B, we think that a suit will lie to remove the 1st defendant. This conclusion is, in our opinion, not inconsistent with the decision in *Cheriya Pangi Achan* v. *Unnalachan* [2]. But Mr. Anantakrishna Aiyar argued that this decision is authority for the larger proposition that whenever a karnavan is designated by a karar, he is not liable to be removed by a suit. We express no opinion on the question whether, even though the karar karnavan is not the senior in age, a suit may not lie at the instance of some of the parties to the

1. (1904) I. L. R., 28 Mad. 182. 2. (1917) 32 M. L. J. 323.

F. B.

Chindan Nambiar v. Kunhi Raman Nambiar.

karar to remove him. But we think that when a *de jure* karnavan is recognised by the karar, he does not acquire a higher status than that which he originally possessed. However the question raised is a very important one, affecting as it does the rights of management in numerous families in Malabar. We have, therefore, resolved to refer the following questions for the decision of the Full Bench :—

(*a*) Where a *de jure* karnavan is a party to a family karar by which his general rights as karnavan subject to some minor exceptions, are taken away, can he be said to have renounced his rights as karnavan ?

(*b*) When, under the above circumstances, the next in age to the karnavan is recognised as the karnavan by the karar, whether a suit will not lie to remove him from the Karnavanship ?

*C. V. Ananthakrishna Aiyar* for the appellant.

*T. R. Ramachandra Aiyar* and *A. Sivarama Menon* for respondents.

The court expressed the following

Sadasiva Aiyar, J.

**Opinion**:—*Sadasiva Aiyar, J.*:—It is clear to my mind that the Karar Exhibit B dated in 1892 deprived the 2nd defendant of his Karnavastanam though with his consent and vested the office in the 1st defendant. The fact that the tarwad (including the new Karnavan) gave the management of a temple and its income to the removed Karnavan did not affect the other results of the Karar, namely, the putting an end to the tenure of the second defendant's office as Karnavan and the appointment of the first defendant to the said office. The supercession of second defendant's rights by the family Karar cannot, of course, be affected by any subsequent unilateral act or expression of intention on his part.

The 1st defendant became not only the *de facto* Karnavan but also the *de jure* Karnavan under the Karar and he can therefore be removed by suit for gross misconduct.

As soon as a Karnavan ceases to be such by death or removal, the next in order of seniority becomes the Karnavan, and any family Karar binding on the person who has ceased to be the Karnavan ceases to have any effect on the new Karnavan "except perhaps where he has himself agreed in that Karar to be bound by those restrictions whenever he succeeded to the stanom."

F. B.

Chindan Nambiar v. Kunhi Raman Nambiar

Sadasiva Aiyar, J.

There is no scope for the framing of a scheme of management by a Court under those circumstances. This was all that I intended to express in *Cheriya Pangi Achan* v. *Unnalachan* 1.

A family Karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as Karnavan is not the same thing in the eye of the law as an unilateral act of relinquishment of his office by the Karnavan though the result on his status as Karnavan may be the same.

I think that the question (a) referred to us does not arise for decision on the above view of the legal nature and effect of the family Karar Exhibit B and I would answer as regards question (b) that a suit will lie to remove the Karnavan recognised as such by a family Karar.

*The Chief Justice* :—I agree.

*Spencer, J.* :—I agree.

A. S. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Kompella Anantaramayya ... *Petitioner** (*Counter-petitioner.*)

v.

Chikkatla Tukkadu ... *Respondent* (*Petitioner.*)

Kompella Anantaramayya v. Chikkatla Tukkadu.

*Cr. P. Code, S. 195 (b)—Sanction to prosecute—Grant of—Jurisdiction—Offence of perjury committed before Sub-Magistrate—Sanction by Joint Magistrate hearing appeal from Sub-Magistrate's order on application for sanction—Validity—Joint Magistrate not superior Court—" Offence committed in or in relation to a proceeding in a Court"—Meaning.*

Where, on an application to a Sub-Magistrate for sanction for perjury with reference to a statement in the evidence of a person examined before him, he granted sanction with reference to another statement and his order was on appeal set aside by the Joint Magistrate who, however, granted sanction with reference to the very statement in respect of which sanction had been applied for before the Sub-Magistrate, *held* that the Joint Magistrate had no jurisdiction to grant sanction because the offence of perjury was not committed in his court or in relation to a proceeding in his Court within the meaning of S. 195 cl. (b) of the Code of Criminal Procedure nor was he a superior Court within the meaning of the section. *Bhadesa Tiwari* v. *Kampta Prasad* 2 dissented from.

Petition praying that in the circumstances stated therein the High Court will be pleased to revise the order of the Court of

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* Crl. M. P. No. 466 of 1917. 14th February, 1918

1. (1917) 32 M. L. J. 323.

2. (1912) I. L. R. 35 All. 90.

Session of Godaveri Division at Rajahmundry dated 5th day of September 1917 in Crl. M. P. No. 23 of 1917 confirming the order of sanction granted by the Joint Magistrate of Rajahmundry in M. P. No. 23 of 1917 in his file.

Kompella Anantaramayya v. Chikkatla Tukkadu.

*G. Venkatramiah* for the petitioner.

*The Public Prosecutor on the 12th inst.* and *K. Ramanatha Shenoi* for the Public Prosecutor on the 14th.

The court made the following

Abdur Rahim, J.

**Order**:—*Abdur Rahim, J.*—It is unnecessary in this matter to repeat the entire history. When the application for sanction for perjury was made to the Sub-Magistrate before whom the petitioners had given evidence he granted the sanction with reference to a particular statement made by the petitioner. That order was set aside by the Joint Magistrate, as in his opinion the order granting sanction was wanting in definiteness. But he granted sanction with reference to another statement made by the petitioner before the same Sub-Magistrate. It appears that the respondent had applied for sanction with reference to the very statement with respect to which sanction was ultimately granted by the Joint Magistrate, Mr. Fotheringham, but the Sub-Magistrate instead of granting sanction with reference to that statement granted sanction with reference to another statement; and Mr. Fotheringham as already stated set aside that order on the ground that it was vague.

The question of law arises whether the Joint Magistrate had jurisdiction to grant sanction when he did not try the case himself, and whether his Court was a superior Court within the meaning of S. 195 of the Criminal Procedure Code. It has been ruled in this court that a Sub-Magistrate is subordinate to a District Magistrate, and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate (*Eroma Variar* v. *Emperor* [1]). The joint magistrate in this case no doubt heard the appeal. The question for decision however is whether it could be said that the offence of perjury was committed in his Court or in relation to a proceeding in his Court; for S. 195, cl. (b) Criminal Procedure Code says, "No Court shall take cognizance of any offence punishable under Ss. 193, 194 etc. of the Penal Code when such offence is committed in, or in relation to,

1. (1903) I L. R. 26 Mad. 656.

Kompella Ananta-ramayya v. Chikkatla Tukkadu.

Abdur Rahim, J.

any proceeding in any Court, except with the previous sanction, or on the complaint of such Court or of some other Court to which such Court is subordinate." The Joint Magistrate argues that the application was not made to him as "an appellate authority for evidence given before the Sub-Magistrate" but "as the original authority for evidence in the appeal before his Court." That is practically the view of the law which has been taken by Banerjea, J. of the Allahabad High Court in *Bhadesar Tiwari* v. *Kamta Prasad* [1]. But with all respect to that learned Judge, I am absolutely unable to agree with him. The case before him was not under clause B but under clause C which deals with offences of forgery and using forged documents, but its language, so far as the present question is concerned, is not substantially different from that of clause B. Banerjea, J. argues that though it could not be said that the document with respect to which sanction was applied for was produced in the Appellate Court, i. e., of the Additional Judge of Basti; it was given in evidence in the proceedings—that is, the appeal—before that Judge. If the interpretation was correct, then the offence of perjury or using a forged document would be committed, first in the Original Court and thereafter again—though the deponent or the party concerned did nothing fresh excepting that appeal was filed against the judgment of the lower Court before the Appellate Court—in the Appellate Court; and again in Second Appeal supposing that a second appeal was preferred in the case. *Prima facie*, dealing with clause B, it seems to be straining the language of the Code too far to say that a witness commits perjury not only in the Court where he gives his evidence but also in the Appellate Court where he did not give any evidence, and where all that could be said was that the evidence given by him was relied upon by the party interested. Neither he nor the party who called him might even use that evidence but might impeach the decree of the lower Court on other grounds.

As regards the words "In relation to any proceeding in any court", a man giving evidence cannot be said to have any proceeding other than the one in which he is giving evidence in contemplation. Where a man gives evidence in a suit or in a criminal case, that evidence is given with reference to the original trial of that suit or criminal case. Then, as is pointed out by the learned pleader for the petitioner, if the intention of the legislature

1. (1912) I. L. R. 35 All. 90.

Kompella Anantaramayya v. Chikkatla Tukkadu.

Abdur Rahim, J.

were that any court hearing the appeal, whether it is a superior court or not, could grant sanction because of the words "where such offence is committed in, or in relation to any proceeding in any court" then it would have been superfluous on the part of the legislature to add the words 'or to some other court to which such court is subordinate.' It seems to me that it would be going much further than the language of the section warrants to say that an offence like that of perjury or using false evidence is committed once in the court of trial, afterwards in appeal with reference to that very evidence. The offence is complete when the evidence is given or the document is produced or put in evidence. It cannot be said to be repeated afterwards because there has been an appeal. It may be that the person who committed the offence does not appeal at all. It is difficult to see how an offence committed in the court of first instance can be said to be multiplied with the number of appeals that are filed.

I would therefore dissent from the judgment in *Bhadesar Tiwari* v. *Kamta Prasad* [1]. In this case the Sub-Magistrate's Court, before which the offence is alleged to have been committed, was not a court subordinate to that of the Joint Magistrate although the latter court heard the appeal. For these reasons I set aside the order of the Joint Magistrate dated 2nd June 1917 granting sanction.

Napier, J.

*Napier, J.*—I agree. I think that Bannerjee, J. in the case in *Bhadesar Tiwari* v. *Kamta Prasad* [1] has been misled owing to his not having given due weight to the language of the section. His reasoning is as follows:—"Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's Court." In a broad sense of the words this is true, because at the hearing of the appeal the false evidence would be read. But this is not what is required by the section. The section requires that such offence should be *committed in, or in relation to, any proceedings in any Court* and that the sanction should be granted by that court or some other court to which that court is subordinate. So that what is to be ascertained is not whether false evidence was *given* in a proceeding, but whether the offence was *committed* in a proceeding. Now, as my learned brother has pointed out, the offence of giving false evidence is complete by the statement on oath or affirmation in a court of

1. (1912) I. L. R 35 A. 90.

Kompella Ananta-ramayya v. Chikkatla Tukkadu.

Napier, J.

facts which the court finds to be false. And the fact that subsequently such statement, having become part of the record comes before an Appellate Court, cannot make this a second offence. The offence is complete when the evidence has been given, and it seems to me impossible to say that, however the proceedings came before the Appellate Court, whether by the appeal of the party who has himself given false evidence or by the appeal of a person in whose favour he gave false evidence or by the appeal of the opposite party or whether the person who gave false evidence in his appeal expresses through his counsel or, it might possibly be, himself has a desire to withdraw that story, however it comes and whatever his attitude before the Appellate Court, the offence is re-committed in that court. It seems to me that this contention must fail on the language of the section and that therefore the objection raised by the learned vakil before us must prevail. For these reasons I agree with the order proposed by my learned brother.

A. S. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Lakshmanan Chetty, through his authorized agent Krishna Iyengar — *Appellant** (*Plaintiff.*)

*v.*

Nagappa Chetty and Raman Chetty, minors by their mother and guardian Karuppaye Achi through their authorized agent Sivarama Aiyar. — *Respondents* (*Defendants.*)

Lakshmana Chetty v. Nagappa Chetty.

*Partnership—Suit for recovery of money advanced by one partner against himself and another constituting a firm—Whether maintainable—Or. 30 R. 9, Civil Procedure Code—Scope of.*

The plaintiff and the defendant's father were the partners of a firm carrying on business at Soomangai and Kyato. The plaintiff had also a firm of his own at Rangoon The plaintiff alleged that his Rangoon firm advanced sums of money on different occasions to the defendant's firm of which he himself was a partner, that the firm was dissolved long before the institution of the suit, and that on taking accounts a sum of Rs 25,000 and odd was found due to the plaintiff's firm. Plaintiff sued for 1/4 of that sum on the basis that the defendant's share in the partnership was 1/4. The defendants contended that that would not be the sum due on taking of the entire account

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* A. S. No. 30 of 1917. 23rd November, 1917.

Lakshmana Chetty v. Nagappa Chetty.

*Held* that the plaintiff was practically suing himself and his partner, and that the suit was not maintainable as he had not asked for accounts

*Kashinatha Kedari* v. *Ganesh*[1], *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee*[2] foll.

O. 30, R. 9, Civil Procedure Code does not profess to lay down the circumstances under which the suits contemplated by that rule would be entertained, and it would not ordinarily be within the scope of the Civil Procedure Code to lay down any such proposition.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in Original Suit No. 26 of 1916.

*K. V. Krishnaswami Aiyar* for Appellant.

*K. Raja Aiyar* for Respondents.

The Court delivered the following

**Judgment**:—This is a suit instituted to recover a sum of Rs. 8,000 and odd from the defendants. The plaintiff and the father of the defendants were partners in a firm, at first called R. M. S. L. P. P. and afterwards changed into R. M. S. L. S. This firm carried on business on Soomangai and Kyato. The plaintiff had also a firm of his own at Rangoon.

The case of the plaintiff is that his Rangoon firm called R. M. S. L. advanced sums of money on different occasions to the defendant's firm of which he himself is a partner, that the latter firm was dissolved long before the institution of the suit, and on taking accounts as between the plaintiff's firm and the defendants' firm it was found that a balance of Rs. 25,000 and odd was due to the plaintiff's firm. The contract between the plaintiff and the father of the defendants with relation to the partnership was that the plaintiff was to have ¾ share and the father of the defendants ¼ share, and we may also take it, so far as we can gather from the pleadings that the plaintiff's share of the liability was ¾ to ¼ of the defendants' father's.

The plaintiff sues to recover not the entire sum of Rs. 25,000 and odd which was found due from the R. M. S. L. S. firm to the plaintiff's firm, but one-fourth of that sum on the basis that his liability being to the extent of the three-fourths, the defendants would only be liable for one-fourth of Rs. 25,000 and odd, and that nothing else is due to anybody else from the R. M. S. L. S. firm. It is not proved that there are any other debts due from that firm. But we may take it to be proved that there are

1. (1902) I. L. R. 26 B. 739. 2. (1878) 1 Cal. L R 515.

Lakshmana Chetty v. Nagappa Chetty.

outstandings, in respect of a decree debt due to the R. M. S. L. S. firm and otherwise. The question is whether a suit of this character is maintainable.

The plaintiff is practically suing himself and his partner, and he says that for the debt due to himself ⅞ of that liability falls upon him. That is to say, he really seeks to establish a certain liability against the defendants on the basis of accounts. The defendants do not admit that upon the taking of the entire account, the amount due would be that claimed by the plaintiff. It may be said on behalf of the plaintiff that if there were any other assets due to the R. M. S. L. S. firm the only difference which that would make would be that the plaintiff will have his share of those assets as well. But that does not by any means conclude the question.

We may take it that one partner can sue another in certain cases, such as the one which this Court had to deal with in *Karri Venkata Reddi* v. *Kollu Narasayya* [1]. There the defendant partner was sued upon a special agreement to hand over certain promissory notes and other documents to the plaintiff. In such a suit no question of accounts arose. It was therefore held that to entertain a suit of that character could in no way work injustice to the defendant partner. The cases referred to in *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* [2], and *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* [3], are different cases. In these, the suits were to recover a share of a particular item of partnership assets after the dissolution of partnership and the decisions lay down the principle and the conditions under which such suits would lie. They have no bearing on the present case.

Mr. K. V. Krishnaswami Iyer, the learned vakil for the appellant, relies very strongly on the provisions of Order XXX R. 9 of the Civil Procedure Code, which says this order 'shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just.' Now all that can be

1. (1908) I.L.R. 32 Mad. 76. 2. (1910) I.L.R. 34 Mad. 112.
3. (1904) I. L. R 28 Mad. 344.

Lakshmana Chetty v. Nagappa Chetty.

said is that this rule contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common But it does not profess to lay down when, and under what circumstances such suits would be entertained and it would not ordinarily be within the scope of the Civil Procedure Code to lay down any such proposition. The rule in question only lays down that if such suits are entertained, the procedure to be followed is that set out in the order.

On the other hand, we have been referred to at least two cases which seem directly to bear on the point-*Kashinatha Kedari* v. *Ganesh* [1] and *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee* [2]. The facts of those cases are very similar to the present case, and it was held that such suits would not lie.

We must however say that we do not understand the reasons given by the Subordinate Judge in support of his view on this question. He says that it is shown by the evidence that there are some assets belonging to the firm and therefore the suit ought to have been instituted against the assets. We do not understand what the learned Subordinate Judge means. He would have been right if he had held that a suit like this could not be entertained as the plaintiff has not asked for accounts. But there is no meaning in his saying that the suit ought to have been 'against the assets.' He also decided against the plaintiff on other grounds, namely, that certain entries in books of accounts filed by him had not been proved; and, even if proved, they would not be sufficient in law to support his case. It is unnecessary, in view of what we have expressed as regards the maintainability of the suit, to pronounce any opinion on that question. We dismiss the appeal with costs.

N. V.

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1. (1902) I. L. R. 26 Bom 739.
2. (1878) 1 Cal. L. R. 545.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

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Vasudevan v. Ittirarichan Nair.

Aramproth Illoth Vasudevan Moosad, Karnavan and Manager of his Illom. ... *Appellant* (*1st Defendant.*)

*v.*

Kattadi Moothedath Ittirarichan Nair. ... *Respondent.* (*Plaintiff.*)

*Malabar law—Right of pre-emption of otti mortgagee—if arises in involuntary sales—C. P. Code S. 65 and O 21 R. 92—whether consistent with ottidar's right of pre-emption.*

The right of pre emption of an otti mortgagee does not arise in the case of involuntary sales, unless the statute under which the sale takes place provides for the exercise of such right. The statutory provisions of the Civil Procedure Code as to sales in execution of decrees are inconsistent with the claim, that the ottidar's right of pre-emption can be enforced against a purchaser in court auction.

*Bai Nath v. Sital Singh* 1 followed.

Second Appeal against the decree of the District Court of South Malabar in Appeal Suit No. 789 of 1915 preferred against the decree of the Court of the First Additional District Munsif of Calicut in Original Suit No. 844 of 1914.

When the case came on for hearing in the First Instance the Court (Ayling and Phillips, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Phillips, J.

*Phillips, J.*—In this case the plaintiff is an ottidar of the plaint property. The jenmi granted a second mortgage, and in execution of a decree upon that mortgage 1st defendant's brother purchased the property subject to plaintiff's otti right. 1st defendant then sued for redemption of the otti and obtained a decree. Plaintiff now sues to enforce his right of pre-emption. The question for consideration is the nature of the rights of an ottidar, when the property, over which he holds the otti, is sold in Court auction.

In *Cheria Krishnan* v. *Vishnu* 2, it was held that an otti mortgagee was entitled "to be fully informed what price he is to pay before he makes up his mind to buy" and that although he has notice of the sale by auction but fails to bid, he is not precluded from subsequently exercising his right of pre-emption. In *Ammotti Haji* v. *Kunhayen Kutti* 3, a somewhat different view was taken

* S. A. No. 1288 of 1915. 13th March 1918.

1. (1890) I L R. 13 All 224.

2. (1882 I. L. R. 5 Mad. 198 3. (1892) I. L R. 15 Mad. 480.

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and it was held that an ottidar in Malabar loses his right of pre-emption if he fails to bid at a Court sale of the land after having been specially invited to attend and exercise his right, and makes no offer to take the property for a long time after the Court sale. The only distinction between the two cases is that in the former the ottidar had only public notice of the sale, whereas in the latter he had had special notice. In *Kanaran Nair* v. *Raman Nambiar* [1] this Court followed the ruling in *Cheria Krishnan* v. *Vishnu* [2], although the ottidar had had special notice of the sale and distinguished *Ammotti Haji* v. *Kunhayen Kutti* on the ground that there may have been evidence in that case on which it could be held that the ottidar had been placed in a position to elect.

It is very difficult to reconcile these three decisions and I think it advisable that the question should be finally determined by a Full Bench, and I am further inclined to the opinion that the decision in *Cheria Krishnan* v. *Vishnu* [2] goes too far. An ottidar is a mortgagee with a right of pre-emption. It is contended for respondent that the pre-emption right of an otti mortgagee in Malabar is something higher than the right of pre-emption as ordinarily understood, it being a right based on custom. The right of an ottidar has been considered by Courts in Madras from 1854 onwards but the question of whether his right of pre-emption was greater than the ordinarily recognized rights of pre-emption in other places does not appear to have been discussed. In *Cheria Krishnan* v. *Vishnu* [2], however, the learned Judges say that "the right of pre-emption is well understood. The otti mortgagee must pay for pre-emption whatever sum is *bona fide* offered to the jenmi for the purchase, if he has the offer made to him by the jenmi and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum, then his right of pre-emption is gone"

In *Mammali* v. *Kunhipakki Haji*,[4] the previous cases on the subject of otti were reviewed and it was held that the right of an ottidar consists in a right to elect when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person, or not. There would seem to be no difference between the right defined as above, and the ordinary right of pre-emption (as understood in Muhammadan and other laws).

1. (1893) 4 M. L. J. 46.
2 (1882) I. L. R. 5 Mad. 198.
3. (1892) I. L. R. 15 Mad. 480.
4. (1912) I. L. R. 38 Mad. 67.

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When therefore the owner intends to sell the land by private treaty, the ottidar is entitled to come in and buy it at the same price, and according to *Cheria Krishnan* v. *Vishnu*,[1] and *Vasudevan* v. *Keshavan* [2], he is further entitled to have an offer to that effect from the owner of the property, although this further right is doubted in *Mammali* v. *Kunhipakki Haji*. [3] When the property is to be sold by Court, it is an involuntary sale and presumably one contrary to the wishes of the owner. In such a case he cannot predict the price at which the property will be sold and consequently he cannot offer the property to the ottidar for a certain fixed price. If he is to offer it after the sale is completed, he will be making an offer which may have the effect of upsetting a sale by Court even after it is confirmed. It is questionable whether it is desirable that the right of pre-emption should be allowed to that extent unless it is clearly established that the right does go so far. In *Baij Nath* v. *Sital Singh* [4], Mahmood, J., held that the right of pre-emption, whether claimed under Muhammadan law, the compact of the *Wajib-ul-arz* or local usage and custom does not arise in respect of compulsory sales, and in this view followed *Abdul Jabel* v. *Khelatchandra Ghos* [5], *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh* [6], and *Sheikh Nuzmoodeen* v. *Kanye Jha* [7]. This aspect of the question does not appear to have been considered in relation to the pre-emptive rights of an ottidar in Malabar, but the arguments of Mahmood, J., in support of his view would equally apply to such rights. In equity the ottidar would be entitled to notice of the sale of property in which he has so large an interest, but I can see no ground for showing him any greater consideration. His right of pre-emption arises out of a contract between him and the owner, and when by order of Court the owner is prevented from intimating the exact amount of the sale price, he should in equity be deemed to have completed his part of the contract when he has informed the ottidar that a sale is to take place and has thus afforded him an opportunity of buying at the price which the property would properly fetch, assuming that the right of pre-emption arises in such cases. There is no question of his being driven to give a fancy auction price, as

1. (1882) I. L. R. 5 Mad. 198. 2. (1884) I. L. R., 7 M 309.
3. (1912) I. L. R. 38 Mad. 67. 4. (1890) I. L. R. 13 All. 224,
5. (1868) I Beng. L. R A C. 105. 6. (1871) 16 W. R. 455,
7. 1 Marshall 565.

remarked in *Cheria Krishnan* v. *Vishnu* [1], for he is not compelled to buy—can cease bidding whenever the bidding has reached the amount which he is willing to pay for the land.

We therefore refer the following questions for decision by a Full Bench:—

1. Does the right of pre-emption of an otti mortgagee arise in the case of an involuntary sale ?

2. If so, is he entitled to be informed of the sale price before he can be called upon to exercise or forego his right ; or is mere notice of the auction sale sufficient ?



*Ayling, J.* :—I agree to the proposed reference, and am inclined to share my learned brother's view as to the applicability of the right of pre-emption in relation to enforced sales.

*C. V. Ananthakrishna Iyer* and *K. P. Ramakrishna Iyer,* for the appellant ;—The right of pre-emption is not applicable to compulsory sales. The legislature by a rule of procedure has provided that the public proclamation which precedes a Court sale is sufficient notice of the sale to the pre-emptors amongst others to come forward and purchase the property. If the pre-emptor does not bid at the auction sale, he should be deemed to have waived his right *Baij Nath* v. *Sital Singh.* [2]. This case is approved and distinguished in a later Allahabad case, *Kanhai Lal* v. *Kalka Prasad* [3] which was a case of private sale.

The right of pre-emption of a co-sharer under the Muhammadan Law applies only to private sales. The pre-emptor has no right as against an auction purchaser. This has been laid down in the Allahabad and Calcutta cases. *Amir Ali's Muhamadan Law,* Vol. I., p. 717, referred to.

In *Ammotti Haji* v. *Kunhayen Kutti* [4] it was held that the ottidar mortgagee's right of pre-emption was not exercisable against an auction purchaser. *Vasudevan* v. *Keshavan* [5] also supports that view.

*Mammali* v. *Kunhi Pakki* [6] *and Kanaran Nair* v. *Raman Nambiar* [7] are against my contention.

[*Sadasiva Iyer, J.*—Pre-emption in this case is a right arising from contract implied by custom.]

1. (1882) I. L. R., 5 Mad. 198.
2. (1890) I. L. R. 13 All. 224 at 227.
3. (1905) I. L. R. 27 All. 670 at 677.
4. (1892) I. L. R. 15 M. 480.
5. (1883) I. L. R. 7 M. 309.
6. (1912) I. L. R. 38 M. 67.
7. (1893) 4 M. L. J. 46.

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Yes ; it is a purely personal obligation. So the court purchaser is not affected by that right of the ottidar. Bhashyam Iyengar, J., has held, that pre-emption is a right which does not run with the land.

*C. Madhavan Nair* for the Respondent :—The ottidar's right is two-fold, (1) right to make further advances in preference to others, (2) the right of pre-emption ; *Moore's Malabar Law and Custom*, p. 251.

[*Sadasiva Iyer, J.*—It arises out of a contract between the parties. How can the hands of the court be tied ?]

The right is based upon custom. It has been recognised in decision after decision, transaction after transaction. It has become part of the substantive law. It is incidental to the tenure of the land. In *Cheriya Krishnan* v. *Vishnu* [1] their Lordships say that the custom is well understood. It is the established custom of the country. *Ramachandrier's Malabar Law*, p. 34, S. 120.

The Allahabad and Calcutta cases are all cases where the right was claimed under the Muhammadan Law or had a Muhammadan origin. They are not applicable to the ottidar's right, which is dependant upon the custom in Malabar, *Mammali* v. *Kunhi Pakki Hagi* [2]. *Baij Nath* v. *Sital Singh* [3], was a case under a special Act of the N. W. Provinces. Further the other learned Judges do not agree with Mahmood, J. in all his observations. *Ramesh Chunder Mitter* v. *Hemchunder Banerjee* [4] is distinguishable, as it was based purely upon contract.

In *Vasudevan* v. *Keshavan* [5] the karnavan refused to pay the price offered by the highest bidder. So it is distinguishable. The observations in that case are in my favour. The right was waived by the ottidar in *Ammoti* v. *Kunhayankutti* [6]. This case is explained in *Kanaran Nair* v. *Raman Nambiar* [7]. In this case it is said that the ottidar need not be present at the auction sale. He must have notice of the sale apart from the proclamation and be informed of the sale price. This has been followed in the latest case, *Mammali* v. *Kunhi Pakki* [2].

1. (1882) I. L. R. 5 M. 198.
2. (1912) I. L. R. 38 M. 67.
3. (1890) I. L. R. 13 All 224.
4. (1871) 15 W. R. 455.
5. (1884) I L. R. 7 M. 307.
6. (1892) 15 M. 480.
7. (1893) 4 M. L. J. 46.

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The pre-emptive right is a right running with the land. A transferee from an ottidar has this right. The legislature has not expressly taken away this right. The auction purchaser takes only the right, title, and interest of the judgment-debtor. The Judgment-debtor's rights are limited by this right of the ottidar.

[*Sadasiva Iyer, J.*—The legislature does not say that the covenant is binding on the Court purchaser.]

All the cases cited were cases of auction sales. It has been the settled law all these years.

*K. P. Ramakrishna Iyer* in reply—Bhashyam Iyengar, J. in a leading and exhaustive decision on pre-emption in *Ramasami* v. *Chinnan* [1] says that a covenant for pre-emption does not create an interest in land.

[*C. Madhavan Nair.*—That case went upon the special terms of the contract.]

Reference was made to *Manchester Ship Canal Co.* v. *Manchester Race-Course Co.* [2].

The Court expressed the following

Wallis, C J.

**Opinion**:—*The Chief Justice* :—It is strange that in none of the cases in this Court dealing with the ottidar's right of pre-emption in Malabar, *Cheria Krishnan* v. *Vishnu* [3], *Vasudevan* v. *Kesavan* [4], *Kanharankutti* v. *Uthotti* [5], *Ammotti Haji* v. *Kuhayen Kutti* [6], *Kanaran Nair* v. *Raman Nambiyar* [7] or *Mammali* v. *Kunhipakki Haji* [8] has the question been considered, how far such a right can be exercised in the case of court and revenue sales consistently with the provisions of the statute law regulating such sales. Both in Bengal and in Northern India, where cases of pre-emption are much more numerous than they are here, it appears to be well settled that it cannot in the absence of statutory provision being made for its exercise, as in the case of some revenue sales in the United Provinces. In *Baij Nath* v. *Sital Singh* [9] Mahmood, J., after reviewing the authorities, states ; "It may therefore be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of a decree or a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforcible, whether such right is claimed under Muhammadan Law, the terms of the *Wajib-ul-arz*, or on the ground of

1. (1900) I. L. R. 24 M. 449.
2. (1901) L. R. 2 Ch. 87.
3. (1882) I. L. R. 5 Mad. 198
4. (1884) I. L. R. 7 Mad. 309.
5. (1890) I. L. R. 13 Mad. 490.
6. (1892) I. L. R. 15 Mad. 480.
7. (1893) 4 M. L. J. 46.
8. (1912) I. L. R. 38 Mad. 67.
9. (1890) I. L. R. 13 All. 224.

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local custom or private contract; but that such compulsory sales being the creation of statute law do furnish occasion for the exercise of the pre-emptive right where such right is provided subject to the rules and restrictions prescribed by these legislative enactments themselves." And he goes on to refer to the provisions of S. 310 of the Code of 1882 and other local statutory provisions. The other learned Judges did not differ from Mahmood, J., on this point, but on the question whether such special statutory provisions had been made in the particular case, and the law as laid down by him was accepted as settled in *Kanhai Lal* v. *Kalka Prasad* [1].

On a careful consideration of the question I agree with the law as laid down by Mahmood, J. I find it quite impossible to reconcile the statutory provisions of the Civil Procedure Code as to sale in execution of decrees with the ottidar's right of pre-emption as now claimed. S. 60 of the Code makes immoveable property belonging to the judgment—debtor liable to attachment and sale in execution of a decree, and S. 65 provides that, where property has been sold in execution of a decree and the sale has become absolute, it is to vest in the purchaser. Under Order 21, R. 92 it becomes absolute where no application is made under R. 89, 90 or 91 of the Code of Civil Procedure, 1908 or where such application is made and disallowed. The rules in question do not provide for the exercise of a right of pre-emption.

There is a very limited recognition of the right of pre-emption in R. 88, and if any further recognition had been intended, it would have been expressly provided. Having regard to the course of the decisions and the importance of the right of pre-emption in Northern India, I can only infer that the omission to make such provision was deliberate. In *Manchester Ship Canal Company* v. *Manchester Race Course Company* [1] it was contended on the one side and not denied on the other that a right of pre-emption was quite incompatible with a sale by auction.

In these circumstances we are bound, in my opinion, even at this late stage to uphold the objection taken and to answer the question in the negative.

*Sadasiva Aiyar, J.*:—I entirely agree and have nothing to add.

*Spencer, J.*:—I also agree.

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1. (1905) I. L. R 27 All. 670. 2. (1901) L. R. 2 Ch. 37.

Rajachari v. Manager, Tirumugoor Devastanam.

Oldfield, J.

and the exception is treated as applicable only to sub-section (1). On this interpretation the decision must be that the suit holding has not ceased to be part of the estate and that the suit should have been filed in a Revenue court.

The Letters Patent Appeal is allowed, the decisions of the learned Judge and the Subordinate Judge being set aside and the plaint being returned for presentation to the Revenue court having jurisdiction. Plaintiff will pay defendant's costs to date.

*Sadasiva Aiyar, J.* :—I entirely agree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Perumal Koundan and others ... *Petitioners* (Respondents.)*

*v.*

The Thirumalarayapuram Jananukoola... Dhanasekara Sanka Nidhi Ltd., through its Official Liquidator A. Venkataswami Nayudu. *Respondent (Petitioner).*

Perumal Koundan v. Thirumalarayapuram Jananukoola Nidhi Ltd.

*Civil Procedure Code, O. 33, Rr. 1, Explanation, 3 and 5 (e)—"Person," meaning of—Company—Right to sue in forma pauperis—Liquidator, financial condition of, immaterial—Agreement to remunerate liquidator for winding up company, if falls within the mischief of R. 5 (e).*

On proof of pauperism, a company represented by its liquidator, can be granted leave to sue *in forma pauperis* for the recovery of a debt due to the company. The word "person" in the explanation to R. 1 of O. 33 of the Civil Procedure Code, is to be understood in the sense in which that term is defined in the General Clauses Act and includes a company or association or body of individuals whether incorporated or not.

Where a company represented by its liquidator applies for leave to sue *in forma pauperis*, the only question is whether the company is a pauper, and the financial standing of the liquidator is immaterial.

Where a Court or a Company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring the case within O 33 R. 5 (e).

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order dated 8th December, 1916 of the Court of the Subordinate Judge of Madura in O. P. No. 303 of 1916.

* C. R. P. No. 367 of 1917. 30th November, 1917.

Perumal Koundan v. Thirumalarayapuram Jananukoola Nidhi Ltd.

*S. Parthasarathi Aiyar* for Appellant.

*C. Padmanabha Aiyangar* and *A. Ramasami Aiyar* for Respondent.

The Court delivered the following

**Judgment**:—The Thirumalarayapuram Jananukoola Dhanasekhara Sanka Nidhi Ltd., which was a company registered under the Indian Companies Act went into liquidation and an official liquidator was appointed. He as liquidator, applied under Or. 33 of the Civil Procedure Code to file a suit on behalf of the Nidhi in *forma pauperis* against the petitioners before us who are alleged to owe the Nidhi about Rs. 8,524 under a promissory note. The allegations in the petition show that the Nidhi was bankrupt and that the only properties it had (except the subject of the suit) were worth Rs. 12. The Subordinate Judge allowed the Nidhi to sue in *forma pauperis* and the respondents have filed this petition against the order.

The chief contention raised before us is that O. 33 of the Civil Procedure Code, does not apply to companies, corporations or other associations. It is argued that as the explanation to O. 33 R. 1 refers to necessary wearing apparel and R. 3 requires presentation of the petition by the "applicant in person" the order necessarily excludes petitioners who are not human beings.

We are unable to accept this contention. The word "person" is not defined in the Code of Civil Procedure and consequently the definition of the word 'person' as including any company or association or body of individuals whether incorporated or not, in the General Clauses Act (X of 1897) would apply unless there is something repugnant to the subject or context. Order 33 of the Civil Procedure Code refers to suits by paupers and rule 1 enacts that any suit may, subject to the provisions of the order, be instituted by a pauper and does not exclude official persons. Now a registered company or any other association may be unable to pay the court-fee payable like any ordinary person and there is no reason to suppose that the legislature did not intend Order 33 to apply to such cases especially when it is remembered that the effect would be to allow debtors to escape payment and defeat or defraud the creditors and share-holders of the company. The explanation to Rule 1 no doubt states that where no court-fee is prescribed, the petitioner should not be entitled to property more than Rupees 100 "other than his necessary wearing apparel." The explanation simply allows deduction of the value of wearing

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apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers. In *Cortis* v. *The Kent Water Works Company* [1] the argument that an enactment (47, Geo. 3, Ch. 111) did not apply to corporations as it allowed a person to appeal on entering into a recognizance which a corporation was not competent to do, was negatived by Bayley, J. who observed as follows: "But assuming that they cannot enter into a recognizance, yet if they are persons capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appearing and that the other part of the clause which requires a recognizance to be entered into applies only to those persons who are capable of entering into a recognizance but is inapplicable to those who are not."

The word used in the explanation is "person" and there is nothing repugnant in applying the definition given in the General Clauses Act. Where the applicant is a company which *ex hypothesi* can have no wearing apparel, then it will not be entitled to deduct anything on account of wearing apparel and will not be a pauper if it has property worth Rupees 100 and the suit is one for which no fee is prescribed.

As regards rule 3 which requires personal presentation of the application to sue in *forma pauperis*, it seems to us that where the law in consequence of personal appearance in courts being impossible either by reason of the party being a company or an infant or lunatic, allows appearance by somebody else, appearance by such person would be sufficient. For example Order 32 of the Civil Procedure Code which relates to minors and persons of unsound mind authorises appearance by the next friend and guardian *ad litem* and it cannot be said that where the minor or lunatic is a pauper, the presentation of a petition to sue in *forma pauperis* by the next friend would be invalid or contravening the provisions of Order 33 Rule 3. So far as companies are concerned, the Companies Act provides for the mode in which the company is to be represented. Under section 179 of the Indian Companies Act the liquidator may institute any suit or other legal proceedings in the name and on behalf of the company and under Order XXIX

1. (1827) 7 B. and C. 314,

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of the Civil Procedure Code, the principal officer of the company may act in legal proceedings on behalf of the company and may be required to appear when personal appearance is necessary. The liquidator can therefore fulfil all the obligations required of a pauper petitioner under Order 33. Rule 3 of Order 33 of the Civil Procedure Code in our opinion only prohibits a pauper who is competent in law to appear in person from taking advantage of Order III of the Civil Procedure Code and appearing by a pleader or recognised agent instead of being present personally. It does not cover cases in which from the nature of the case, physical presence is impossible or where the law owing to any disability directs that all acts required by the code should be performed by a next friend. We are of opinion that there is nothing in Rule 3 to prevent an official liquidator from appearing and presenting the petition. A company or other association being a 'person' within the meaning of the definition of the General Clauses Act which applies to the Civil Procedure Code of 1908, could prima facie apply for leave to sue in *forma pauperis* and as we see nothing in O. 33 R. 1 and 3 which will be repugnant to the application of the definition we think a company can take advantage of the provisions of O. 33 if it is a pauper.

It is next argued that as the liquidator is not a pauper though the Company may be so, O. 33 would not apply. The suit is really by the company and as the liquidator only acts for the company, being so to say its agent, his financial standing is immaterial. We think the case is covered by *Venkatanarasayya* v. *Achemma* [1] where it was held that a next friend who is not a pauper can sue in *forma pauperis* if the minor is proved to be a pauper. Reference was made to *In the matter of the will of Dawubai* [2] and *Manaji Rajiyi* (*Rao Saheb*) v. *Khandoo Baloo* [3]. These were cases of executors suing and without expressing any opinion as to the correctness of these decisions, it is sufficient for the purposes of this case to say that in the case of executors the estate vests in them and they are the real plaintiffs, though they sue not for their own benefit but for the benefit of the beneficiaries. For the purpose of O. 33 the real question is who is the *actual* plaintiff, and is he a pauper within the meaning of the explanation to O. 33 R. 1 of the Civil Procedure Code.

1. (1881) I. L. R. 3 M. 3. 2. (1893) I. L. R. 18 B. 237.
3. (1911) I. L. R. 36 B. 279.

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The last contention is that as the liquidator received by his order of appointment a commission, he is interested in the subject matter of the suit within the meaning of O. 33 R. 5 of the Code of Civil Procedure. The provision only applies to agreements between the pauper and a third person with reference to the subject matter of the suit. Where a court or a company appoints a liquidator he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring him within clause (e) of O. 33 R. 5. No particular debt is ear-marked with the payment and even if it were so, an agreement in pursuance of the Companies Act to remunerate the liquidator for winding up the Company would be on the same footing as an agreement by the pauper with his vakil to pay him the legal fees for conducting the suit.

We see no reason to interfere and dismiss the petition with costs.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE NAPIER.

Mahanakali Lakshmiah and another ... *Appellants** (*Plaintiffs*).

*v.*

Karnam Narayanappa and others ... *Respondents (Defendants 1, 3, to 14, 17, 18, 15, 16, & 19.)*

Mahanakali Lakshmiah v. Karnam Narayanappa.

*Injunction—Right to the use of water in a Government channel—Right not based on prescription—Mere possessory right—Suit for declaration of right and injunction—Government not impleaded in the suit—Effect of—Incorporeal hereditament, possessory right, in respect of.*

In a suit by plaintiffs for recovery of possession of certain ryotwari lands from their lessees, the defendants, the plaintiffs also asked for a declaration of their rights and an injunction restraining the defendants from causing obstruction to the flow of water from a Government channel called Diguva to the suit lands. The Government, however, was not made a party to the suit. It was found that according to the Government register the source of supply to the suit lands was another Government channel but that the defendants who were in possession of the suit lands as lessees, had, under some arrangement with the Government, been irrigating them for the last 20 or 30 years with the water of Diguva channel which was the proper source of irrigation for the defendant's own lands. It was also found that the plaintiffs had not acquired a right of easement or any right to take water from

* S A No. 1278 of 1916. 11th January, 1918.

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the Diguva channel by prescription. The plaintiffs claimed that they must be deemed to have been in possession of the right to take water for the suit lands from the Diguva channel through their lessees, the defendants and that as their possessory right had been threatened by the defendants they were entitled to a prohibitory injunction consequent upon a declaration of their rights.

*Held*, that, in the circumstances of the case, the plaintiffs were not entitled to the declaration and injunction prayed for. The plaintiffs had established no right as against anybody in the water of the Diguva channel, whatever right they might have as against the Government for the supply of water to the lands in question. Nor could the plaintiffs be said to have been in such possession of the channel or any easement with reference to it, as to entitle them to an injunction. The grant of a declaration being discretionary, the court should not grant a declaratory decree to the plaintiffs in the absence of the Government, the owner of the channel in question.

*Narasayya* v. *Ganapathi Row* [1], *Kondapa Rajam Naidu* v. *Devarakondu Suryanarayana* [2], referred to.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Bellary in A. S. No. 10 of 1915 (A. S. No. 18 of 1915) on the file of the District Court of Bellary) preferred against the decree of the court of the District Munsiff of Bellary in O. S. No. 521 of 1910.

*L. A. Govindaraghava Aiyar* for Appellant.

*T. Prakasam* for Respondent.

The Court delivered the following

Abdur Rahim, J.

**Judgments** :—*Abdur Rahim, J.* :—The plaintiffs-appellants sued to recover possession of two plots of land 12A and 12B and asked for a declaration of their rights and sought to restrain the defendants from causing obstruction to the flow of water from a channel called Diguva Kalava to the lands in dispute. They got a decree for possession of the lands excepting an acre. There are two questions in the appeal, one is whether they are entitled to an injunction as prayed for or at least to a declaration that they are entitled to the use of the water in the Diguva channel for irrigating the lands 12A and 12B and the other, whether the judgment of the lower appellate court with respect to one acre disallowed to them is right.

The channel takes its rise in the bed of a river called Pennar. The land of the defendants is lower than the land of the plaintiffs. The channel is admittedly a Government channel and the lands of both parties are ryotwari. It seems to be an admitted fact that the channel which is shown in the Government register as the source of supply to the land in

1. (1913) I. L. R. 38 M. 280. 2, (1910) I. L. R. 34 M. 173=20 M.L J. 853.

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dispute is another channel called Yarragunta Kalava and the Diguva channel is shown in the register as the source of supply to the defendants' land. The defendants have been in possession of the disputed lands for a long time about 30 years or so as lessees of the plaintiffs. During that period they used the Diguva channel for irrigating the lands in suit. It would also appear from the evidence that for some time Yerragunta channel was in disrepair. That might explain the fact why the water of the Diguva channel was used by the defendants for irrigation while they were in possession of the plaint lands. The channel being a Government channel, neither the plaintiffs nor the defendants have any right to it. Both of them holding wet ryotwari lands are entitled to the supply of water from the Government for the irrigation of their lands. But it is for the Government to distribute the water in any way it thinks fit. That proposition has not been disputed before us and cannot be disputed having regard to the rulings on the subject. The case of the plaintiffs, as put before us, was not that they had acquired any right of easement by prescription, which the lower court has negatived, but that the Government having regard to the practice that has obtained within the last 20 or 30 years would have no objection to their using the Diguva channel for irrigating Survey Nos. 12A and 12B. It is then contended that the defendants have no right to interfere with their use of the water of the Diguva channel as they have threatened to do. It is not alleged that the defendants have done anything on the plaintiff's lands to interfere with their enjoyment of the water, nor even that they have in any way as yet interfered with the channel which belongs, as already pointed out, to the Government. The only ground for asking for an injunction or for a declaration is that the defendants have threatened interference and claim the right to do so. The important point in this connection is that the Secretary of State who is the owner of the channel and against whom alone the plaintiffs are entitled to claim a supply of water has not been made a party. The plaintiffs have not only not established what was their original case, that the channel itself belonged to them, but also failed to establish that they had acquired any easement or right to take water from this channel by prescription. They undoubtedly have a right to a proper supply of water to be secured by the Government. But that is quite a different thing

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from any right in the channel itself or to the use of the water of this particular channel. If, in a case of this nature, we were to give a declaration in favour of the plaintiffs in the absence of the Government, we should be really deciding the plaintiff's right as against the Government without Government being represented in the suit. Indeed Mr. Govindaraghava Aiyar for the appellants did not claim that they (appellants) were entitled to such a decree. What he says is that the plaintiffs must be held to be in possession of this right to take water, and as the possessory right has been threatened, they are entitled on the analogy of cases regarding possessory rights in land to a prohibitory injunction. In this connection our attention has been drawn to a ruling of Benson and Krishnaswami Aiyar, JJ., reported in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* [1]. That case has been considered in a recent decision of this court reported in *Narasapayya* v. *Ganapathi Row* [2], judgment in which was delivered by Miller and Sadasiva Aiyar, JJ. In that case, the learned Judges thought that the decision in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* [1] might be right on its facts, but they held, after a careful and elaborate discussion of the law, that it was not quite accurate to speak of possessory rights in connection with incorporeal hereditaments and laid down that where a right to easement has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not have any remedy against persons interfering with such user and enjoyment. They were therefore not prepared to endorse a proposition to the contrary, if any such proposition was laid down in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* [1]. I respectfully agree with the ruling in *Narasapayya* v. *Ganapathi Row* [2], but it is not necessary to pronounce upon the soundness of the view propounded in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* [1] as the facts of the present case are clearly distinguishable. Here it was the defendants that were, for 20 or 30 years before the suit, using the water of the channel in question for irrigating the land in dispute which was then in their possession. They had lands lower down which, strictly according to custom and practice, should be irrigated by the Diguva channel. We have no evidence here as to the arrangement by which the defendants obtained from the Government water from this channel for the irrigation of

1. (1910) I. L. R. 34 M. 173=20 M. L. J. 803. 2. (1913) I. L. R. 38 M. 280.

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Survey Nos. 12A and 12B. But there can be no doubt that whatever be the nature of that arrangement, it was made to suit their own convenience. It is impossible to see how the enjoyment of water under such an arrangement by the defendants would amount in law to possession of the channel by the plaintiffs. Whether the proposition laid down in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* [1] is correct or not, has to be considered more fully when the point directly arises. In the present case, the plaintiffs could not in any way be said to have been in possession of the channel or any easement with reference to it. That being so, there is no authority for granting the injunction which they seek.. The fact is, the plaintiffs have established no right as against anybody in the water of this particular channel, whatever rights they may have as against the Government for the supply of water to the land in dispute. Further I may add that so far as the question of declaration is concerned, it is a discretionary remedy and the facts of the case are certainly not such that we should be justified in granting a declaratory decree in the absence of the Secretary of State, the owner of the channel. On this ground therefore, I shall hold that the subordinate Judge was right in dismissing the plaintiffs' claim to an injunction, and that they are not entitled to any declaration with respect to this channel.

[The rest of the judgment is not material to this report—Rep.]

The appeal fails and must be dismissed with costs. The memorandum of objections is also dismissed with costs.

Napier, J

*Napier, J.*—I agree and would only add a few words. The lower appellate court has refused the injunction asked for on grounds which my learned brother and myself think are not correct, and it is for that reason that I wish to state what I conceive to be the correct view to take. The lower appellate court has held that as the plaintiffs could not claim against the Government the right to take water from the channel, therefore the defendants were entitled to prevent the plaintiffs taking it. That statement of law is to be found at page 55 of the judgment where the learned Judge says, "the defendants who hold land, irrigated by the channel are entitled to prevent the plaintiffs from using the water, to which they have no right." This statement of law is, in my opinion, entirely unsound and I agree with my

1. (1910) I. L. R. 34 M. 173

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learned brother in holding that the rights both of the plaintiffs and of the defendants to water in respect of the ryotwari wet land which they hold are, as has been laid down by this court time after time, the right to their customary supply by whatever means the Government chose to put the water on their land. But it appears that, in the lower courts, the claim by the plaintiffs for an injunction was put on the ground that they had acquired some sort of easement, probably, by the user of this water by the defendants for 20 years when they were the plaintiffs' tenants. That contention, I agree with the lower appellate court, is entirely unsound It is impossible for a person to acquire an easement in water in a Government channel when that water has been supplied by Government for the purpose of irrigating land and in fulfilment of the duty cast upon them to supply water to lands which they classify as wet. Therefore no easement can possibly be acquired. Mr. Govindaraghava Iyer in this court has put his case on an entirely different footing and has asked us to give an injunction limited to the time and period during which the Government is prepared to give the necessary water for this land down the channel. The answer to that claim is to be found in the judgment which has been delivered by my learned brother in which he points out that there is no possession here and that there is no specific right in particular water in this particular channel; and in view of the fact that the Government is not a party to this suit, it would be inadvisable to give any injunction which would necessarily be based on a declaration of right when such declaration of right can only be operative as long as the Government thinks it advisable to supply water by this channel. I therefore entirely agree that this is not a case in which an injunction should be granted and, on this ground, I would uphold the lower appellate court's judgment. On the other points, I am in entire concurrence with the view expressed by my learned brother. The appeal is dismissed with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BAKEWELL.

Muthaya Shetti ... *Appellant** (*Plaintiff.*)

*v.*

Kanthappa Shetti ... *Respondent* (*Defendant.*)

Muthaya Shetti v. Kanthappa Shetti.

*Limitation Act, Art. 134—Transferee from mortgagee by conditional sale—Whether takes an absolute interest—Intention—Burden of proof of—Civil Procedure Code, S. 11, Explanation 2—Finding on issue necessary for decision, adverse to party in whose favour the decree is passed, if* res judicata—res judicata, *if dependent upon right of appeal.*

Where the plaintiff brought a suit to redeem a mortgage by conditional sale executed by his predecessor in title to one S in 1872 and where it was proved that S sold the property comprised thereunder to V in 1879 with the intention of transferring an absolute interest, and the intention of the parties was that there should be an absolute transfer of title.

*Held*, that the suit was barred by Art. 134 of the Limitation Act, as more than 12 years had elapsed since the date of the transfer by the original mortgagee.

Per *Seshagiri Aiyar* and *Bakewell, JJ.*—Whether a transferee from a mortgagee took an absolute interest or only a mortgage interest, is a question of intention. The fact that his vendor had only a mortgage right would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it. The burden of proving such intention is upon the purchaser.

*Radhanath Doss* v. *Gisborne* [1], and *Pandu* v *Vithu* [2], followed.

*Kannusami Thangirayan* v. *Muthuswami Pillai* [3], *Subbaya Pandaram* v. *Mohammad Mustapha Marakayar* [4], *Singaram Chettiar* v. *Kalyanasundaram Pillai* [5], *Baluswami Iyer* v. *Venkitaswamy Naicken* [6], referred to.

The omission from the Acts of 1877 and 1908 of the words 'in good faith" which were in S. 5 of the Act of 1859 which was applied in *Radhanath Doss* v *Gisborne* [1], does not affect the present question

Per *Bakewell, J.*—If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

Where a suit brought by a member of an undivided Hindu family to set aside an alienation by the manager was dismissed on the ground that the alienation was a mortgage and the suit ought to have been one in redemption. *Held*, that the decision as to whether the alienation was by way of mortgage or sale operated as *res judicata* against the alienee in the subsequent suit brought for redemption.

Per *Seshagiri Aiyar, J.*—If there has been an adverse finding on an issue necessary for the decision of the case but the final decree is in favour of the party against whom the issue is found, such finding not being incorporated in the decree, no appeal seems to lie from the decision, as Ss. 96 and 100, Civil Procedure Code give a right of appeal only against decrees.

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* S. A. No. 1801 of 1915. 17th December, 1915.

1. (1871) 14 M. I. A. 1.
2. (1894) I. L. R. 19 Bom. 140.
3. (1917) M. W. N. 5.
4. (1916) 32 M. L. J. 85.
5. (1914) 1 L. W. 687.
6. (1916) 32 M. L. J. 24.

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*Yusuf Sahib* v *Durji*[1], *Ranganathan Chetty* v. *Lakshmi Ammal*[2], *Krishna Chandra Goldar* v. *Mohesh Chandra Saha*[3], *Secretary of State* v. *Swaminadha Kounden*[4], *Brij Behari Lal* v. *Shinanath*[5], referred to.

A finding if necessary for the decision of the suit is *res judicata* even though there is no right of appeal There is nothing in the language of S. 11, Civil Procedure Code to suggest such a test. The language of Explanation 2 implies that the competence of a court for purpose of *res judicata* is not affected by the fact, that its decision is not appealable The proper procedure in such cases seems to be for the party to ask the Court to embody the finding in the decree, so that he may have a right of appeal against such decision.

*Jamaitunissa* v. *Latfunnissa*[6], referred to.

Second Appeal against the Decree of the District Court of South Kanara in Appeal Suit No 326 of 1914, preferred against the Decree of the Court of the District Munsif of Mangalore in Original Suit No. 19 of 1913.

*B. Sitarama Rao* for Appellants.

*C. V. Ananthakrishna Aiyar* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J.*—The predecessors in title of the plaintiff executed Exhibit A to one Shankaranaranappayya in 1872. Shankaranaranappayya sold the property comprised thereunder to Venkappayya under Exhibit I in 1879. Venkappayya's widow sold it in 1897 to Puttappayya and Puttappayya's sons sold the same in 1912 to the defendant The present suit is brought by the plaintiff to redeem the mortgage of 1872. The answer of the defendant is that the suit is barred by Article 134 of the Limitation Act as more than twelve years have elapsed since the date of the transfer by the original mortgagee. Both the Courts have come to the conclusion that the suit is barred by limitation. The judgment of the District Judge is so meagre that we were obliged to hear this case as a first appeal. Mr. Sitarama Row contended before us that under article 134 the burden of proving that the transferee from the mortgagee had acquired an absolute right in the property lay on the defendant.

Before considering this question, I shall dispose of a preliminary point suggested by Mr. Ananthakrishna Aiyar for the respondent, namely, that Exhibit A is an absolute conveyance with an option to repurchase, and that consequently his client is the absolute owner of the property. In answer to this suggestion,

1. (1907) I. L. R 30 M. 447.
2. (1913) 25 M. L. J. 379.
3. (1905) 9 C. W. N. 584
4. (1911) I. L. R. 37 M. 25=21 M. L. J. 947.
5. (1916) 20 C. W. N. 1354.
6. (1885) I. L. R 7 A. 606.

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the learned vakil for the appellant pointed out that the construction of Exhibit A is *res judicata* by virtue of a decision of the District Court of South Kanara in the year 1886. That decision was given under the following circumstances. A member of the plaintiff's family sued his brothers for partition, and claimed a share in the property in dispute alleging that the alienation of it was not for necessary purposes. The District Munsif held that the plaintiff was entitled to recover a third share of the property on paying a third of the mortgage amount. There was an appeal by the alleged mortgagee, the 9th defendant in that case. His contention was that the transaction was not a mortgage but an absolute sale with an option to repurchase. Mr. Best, the District Judge, held that it was a mortgage and not a sale. He further held that it was not open to the plaintiff to sue for the redemption of a portion of the property by offering to pay only a portion of the mortgage debt, and that moreover as the suit was not one for redemption, it should be dismissed *qua* this property.

The question is whether this conclusion of the then District Judge of South Kanara is *res judicata*. Mr. Ananthakrishna Aiyar strenuously argued that as the suit was dismissed and as the mortgagee could not have appealed against the decision of the District Judge although the finding on the construction of Exhibit A was against him, the matter is not *res judicata*. Upon the question whether a bare finding upon an issue when the final conclusion is in favour of the party against whom the decision on the issue is given, gives a right of appeal to the party, there have been differences of opinion. In *Yusuf Sahib* v. *Durgi* [1], it was apparently held that an appeal lies under the circumstances. In *Ranganatham Chetty* v. *Lakshmiammal* [1], the same view was taken. Both these cases follow *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* [2]. In *Venkata Suryanarayana* v. *Sivasankaranarayana* [3], the question was left open. There is a decision of Ayling and Spencer, JJ. in *Secretary of State* v. *Saminatha Kownden* [4], which is inconsistent with *Yusuf Sahib* v. *Durgi* [5], and *Ranganatham Chetty* v. *Lakshmiammal* [1]. See also *Brij Behari Lal* v. *Shivanath Prasad* [6]. Having regard to the language of Ss. 96 and 100 of the Code of Civil Procedure which gives a right of appeal only against decrees, it seems

1. (1913) 25 M. L. J. 379.
2. (1905) 9 C. W. N. 584.
3. (1914) 17 M. L. T. 85.
4. (1911) I. L. R. 37 Mad. 25.
5. (1907) I. L. R. 30 Mad. 447.
6. (1916) 20 C. W. N. 1354.

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doubtful whether the two earlier Madras decisions are correct. If the decision in this case depended solely upon that question, I would have felt bound to refer the matter to a Full Bench; but I think that this case can be disposed of upon other grounds. I agree with Mr. Sitarama Row that the fact that a party against whom an issue is decided has no right of appeal does not affect the rule of *res judicata*. There is nothing in the language of S. 11 to suggest such a test. The language of explanation 2 to that section implies that the competence of a Court for purpose of *res judicata* is not affected by the fact that its decision is not appealable. It is true that this explanation was introduced to put an end to a controversy which existed as to whether when a decree is not appealable to the same tribunal the Court which decided the earlier claim can be held to have been competent to adjudicate upon the subsequent claim litigated in a superior Court. None-the-less, the wide language of the explanation shows that the legislature did not intend that the test of *res judicata* should depend on the right of appeal. I therefore overrule the first contention. Mr. Ananatha Krishna Aiyar then argued that the decision on Exhibit A was not necessary for the conclusion which was come to in the suit, and that consequently the matter is not *res judicata*. The cases on this point may be grouped under four heads: the first class of cases relates to the decision on issues which are altogether unnecessary for the disposal of the case. For instance, decisions on the character of the defendant's holding where the suit is dismissed on the ground that there has been no notice to quit or that there had been no exchange of pattas and Muchilikas: *D. Narasamma* v. *D Kannaya* [1], and *Muthukumarappa* v. *Arumuga*, [2] represent this class of cases. In these cases as the pronouncement upon the tenure of the defendant was not necessary for the disposal of the case, the decision upon that issue was held not to be *res judicata*. It is to this class of cases the observation of Sir R. Collier in *Rajah Run Bahadur Singh* v. *Mussumut Lachoo Koer* [3], that "as the decree was not based upon it, but in spite of it" there can be no *res judicata*, applies. See also *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* [4], *Thakur Magundeo* v. *Thakur Mahadeo Singh* [5], and

1. (1881) I L. R. 4 Mad. 134
2. (1883) I. L. R. 7 Mad. 145
3. (1884) L. R. 12 I. A. 23 : I.L.R 11 C. 301.
4. (1886) I. L. R. 13 Cal. 17.
5. (1891) I. L. R. 18 Cal. 647.

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*Shib Charan Lal* v. *Raghu Nath* [1]. The second class deals with cases where although the decision of an issue is unnecessary for the disposal of the case, still for some reason the Court embodies that decision in the decree itself. Then the matter becomes *res judicata* not on the ground that there has been a decision on the issue, but because there is a decree of the Court which is binding upon the parties: *Kaveri Ammal* v. *Sastri Ramier* [2], and *Mota Holiappa* v. *Vithal Gopal* [3]. The third class relates to judgments which decide more than one issue; but it is doubtful from those judgments on which of these issues the final conclusion was based. In such a case the decision on both the issues will be *res judicata*. See *Peary Mohan Mukerjee* v. *Ambica Churn Bandopadhya* [4], and the recent decision of the learned Chief Justice and Justice Phillips in Appeal No. 62 of 1913*. Now I come to the fourth class. In the fourth class, the decision upon the issue is necessary, but unfortunately, the party against whom that decision is given could not appeal against it as the final decree is in his favour. In such a case it seems to me that the decision on the issue would be *res judicata*. The proper procedure where the defendant is affected by a decision on an issue which he has not the opportunity of contesting in appeal may be as suggested by Petheram C. J., in *Jamaitunnissa* v. *Latifunissa* [5], that is to say, he can ask the court which has given an adverse decision on a material issue to embody it in the decree so that he may have a right of appeal against such a decision. But if he neglects the opportunity and the decision itself is necessary for the disposal of the case, there seems to be no escape from the bar of *res judicata*. On the whole I have come to the conclusion that the decision of Mr. Best in 1886 which was absolutely necessary for the decision of the case and which has stood unchallenged for thirty years is binding on the parties, and that Exhibit A should be construed as a mortgage by conditional sale and not as a sale with an option to repurchase.

This conclusion throws me back upon the question whether the suit is barred by limitation. Article 134 has given rise to conflicting decisions. I do not propose to examine them at any

1. (1895) I L. 17 All 174.
2. (1905) I L. R. 26 Mad. 104.
3. (1916) I L. R. 40 Bom. 662.
4. (1897) I. L. R. 24 Cal. 900.
5. (1885) I L. R. 7 All. 606.

* Secretary of State for India v. Maharaja of Vencatagiri. 31 M. L. J. 97.

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length in the present case. In *Radanath Doss* v. *Gisborne*,[1] at a time when the corresponding Article of the Act of 1859 contained the words "in good faith" Lord Cairns delivering the judgment of the Judicial Committee held that the burden of proving that the purchaser acquired an absolute interest in the property lay upon such purchaser. In the Acts of 1877 and 1908, in addition to the other changes, the words "in good faith" were omitted. It is unnecessary to canvass the reasons which led the legislature to omit these words. In *Radanath Doss* v. *Gisborne*, [1] the Judicial Committee pointed out that it must be shown that the purchaser honestly believed that he was acquiring an absolute right to the property. This deduction was made not because of the existence of the words "in good faith" but because of the use of the expression 'purchaser'. I do not think that the changes introduced by the Act of 1877 and of 1908 have absolved the Court from the necessity of coming to a conclusion upon this question If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, article 134 is only a branch of the law of prescription, and the question to be determined would be what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it ? In *Pandu* v. *Vithu*, [2] that is the test that was suggested; *Kannuswami Thanjirayan* v. *Muthuswami Pillai*, [3] to which Mr. Ananthakrishna Aiyar drew our attention quotes that case with approval. I do not think that *Subbaiya Pandaram* v. *Mahamad Musthapa Maracayar*,[4] decides anything to the contrary. *Singaram Chettiar* v. *Kalyanasundaram Pillai*, [5] is in favour of this view. See also *Baluswamy Iyer* v. *Venkitaswamy Naicken* [6] The language of the article is not opposed to this proposition. In the present case this question has not been considered by either of the Courts below. I express no opinion on the question of the burden of proof, bearing in mind the observations of Lord Parker of Waddington that the Courts in this country are too prone to base their decisions on the

1 (1871) 14 M. I. A. 1.
2. (1894) I. L. R. 19 Bom. 140.
3 (1917) M. W. N. 5
4. (1916) 32 M. L. J. 85.
5. (1914) 1 L. W. 687.
6. (1916) 32 M. L. J. 24.

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abstract theory as to onus. But seeing that the plaintiff seeks to disturb a possession which has been with the defendant for a considerable period, *prima facie*, he must be called upon to prove his case. There must be a finding on the following issue:

Did the executant of Exhibit I intend to transfer an absolute interest in the property? and was it the intention of the parties that there should be an absolute transfer of title to the property?

Finding on the evidence on the record within a month from the date of the re-opening of the Court. Seven days for objections.

Bakewell, J.

*Bakewell, J.*:—I agree that the document which forms the root of the respondent's title must as between the parties be held to be a mortgage, and I propose to deal only with the question of limitation. It is I think clear from the wording of article 148 of the Limitation Act, 1908, that it deals with suits in which the cause of action arises upon the contract of mortgage, and the article applies to a transferee of the mortgagee's interest under that contract: Article 134 therefore provides for cases where the transfer of mortgaged property by the mortgagee gives rise to a cause of action apart from the mortgage contract. The condition of good faith on the part of the transferee which was contained in S. 5 of Act XIV of 1859 has been eliminated from article 134 but otherwise the article substantially corresponds with that section read with Cl. 12 of S. I.

In *Radanath Doss* v. *Gisborne*,[1] their Lordships of the Privy Council in discussing S. 5 of the Act of 1859 considered separately each of the three conditions prescribed thereby, and defined "purchaser" as meaning "some person who purchases that which *de facto* is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title." They held that the pleadings did not allege, and that there was no evidence of, any negotiation for such a purchase and "no evidence of any allegation on the part of the vendor which would lead Messrs. Gisborne and Company (the transferrees) to believe that this was an absolute title which they held to the property in question. The only evidence that they were purchasers at all is the production of the purchase deed," which their Lordships held contained "no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeanwan Estate was a

1. (1871) 14 M. I. A. 1.

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property which the vendor claimed to hold by what we should call in this country a fee simple title." The word "transfer" includes a purchase (see Transfer of Property Act, S. 5) and the transaction in the present case is alleged to be a purchase, and I think that their Lordships' observations apply to Article 134.

It follows that a transferee who claims the benefit of the article must adduce evidence that he intended to purchase an absolute title, which will be in the first place the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. An important preliminary to a sale of immoveable property, which seems however to be frequently neglected is a careful investigation of the vendor's title, and I think that their Lordships had this in mind when in the passage first quoted they refer to a representation made to the purchaser and to his full belief that he was acquiring an absolute title. Evidence as to the documents of title produced by the vendor, and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest intended to be transferred. If, for instance, it should appear that the purchaser refrained from calling for and examining the title deeds and from examining the register of assurances, or from enquiry as to who was in possession of the property, or otherwise abstained from means available to him of ascertaining the title or that he in fact inspected the mortgage document under which the vendor claimed the property, there would be evidence upon which the Court might hold that the parties did not intend to transfer an absolute property but such interest only as was vested in the transferor, or possibly that the mortgagee intended to commit a fraud upon the mortgagor and that the transferee was accessory thereto or did not act in good faith. (See S. 18 of the Limitation Act). If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

This view appears to me to be supported by the decisions of this Court reported in *Kannuswami Thanjirayan* v. *Muthusami Pillai* [1] and *Baluswamy Iyer* v. *Venkitaswamy Naiken* [2] and *Subbaiya Pandaram* v. *Mahomed Musthapa Maracayar* [3].

1. (1917) M. W. N. 5. 2. (1916) 32 M. L. J. 24.
3. (1916) 32 M. L. J. 85.

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The Lower Appellate Court has dealt with the case in a very summary manner and I would remand it to that Court for a finding on the issue framed by my learned brother.

[In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted a finding to the effect, that the executant of Exhibit I, intended to transfer an absolute interest, and that the intention of the parties was that there should be an absolute transfer of title of the property.]

The Court delivered the following

**Judgment**:—We accept the finding and dismiss the Second Appeal with costs.

N. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Subramania Aiyar ... *Appellant** (*Plaintiff*).

*v.*

Narayanaswami Vandayar alias Narayanaswami Tevar. *Respondent* (*Defendant*).

Subramania Aiyar v. Narayanaswami Vandayar.

*Transfer of Property Act, Section 83—Deposit—Tender of more amount than is actually due on the mortgage, validity of—Deposit with conditions not covered by the section—Objection to deposit, waiver of—Right to interest.*

In the year 1902 the defendant obtained a usufructuary mortgage of several items of property. In 1908 the plaintiff purchased in court auction a portion of the property subject however to the defendant's mortgage. On the 9th January 1912 plaintiff deposited in court the full amount due on the mortgage and presented a petition requesting the court to pass an order "directing the counter-petitioner (defendant) to hand over all the mortgaged properties with the produce to the petitioner (plaintiff) on receiving the mortgage money or directing the counter-petitioner (defendant) to hand over the lands purchased by the plaintiff in auction on receiving a proportionate amount, making the counter-petitioner liable for costs and granting other reliefs." The court gave notice of the deposit under S. 83 of the Transfer of Property Act, but the mortgagee took no objection that the mortgagor had not deposited the amount remaining due on the mortgage as required by the section but merely declined to accept the amount deposited on the ground that there was only an offer to pay a proportionate amount without specifying what that amount actually was. The mortgagee also expressed his willingness to hand over such of the properties as had been purchased by the plaintiff on receiving the whole of the mortgage money. As the parties were not able to come to terms the court passed the following order on plaintiff's petition "Counter

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* S. A. No. 634 of 1916. 30th October, 1917.

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petitioner (defendant) refuses to receive the money. Petitioner (plaintiff) is referred to a regular suit. This petition is dismissed." In 1913 plaintiff brought a suit for redemption of the properties purchased by him and it was found that the deposit had remained in court all along since 1912 and that the amount stated in the plaint as due to the defendant in respect of the suit properties was correct. *Held*, that there was a good deposit of the mortgage money and the plaintiff was entitled to interest on the amount of deposit after the date of service of the plaint and the summons on the defendant.

*Per Seshagiri Aiyar, J*:—A tender of a sum larger than the amount remaining due on a mortgage is a valid tender under S 83 of the Transfer of Property Act.

Cases on the subject discussed.

Second appeal against the decree dated 19th January 1916 of the District Court of Tanjore in A. S. No. 280 of 1915 preferred against the decree of the Court of the Subordinate Judge of Negapatam in O. S. 69 of 1913.

*T. R. Ramachandra Aiyar* and *S. Rangachariar* for the Appellants.

*K. R. Narayanaswami Aiyar* for the Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

**Judgments**:—*Seshagiri Aiyar, J*:—This suit is for redemption. Although the question of the priority of the two mortgages in dispute is not easy to determine, I shall proceed on the same assumption on which the courts below have acted throughout The defendant obtained a mortgage of the A schedule properties in 1902. On a portion of these properties which are included in the B schedule there was a mortgage to one Bava Rowther. This Rowther brought a suit on his mortgage. The properties were put up to sale and the present plaintiff purchased the B schedule properties alone in 1908, subject to the defendant's mortgage. After he became the purchaser, the plaintiff presented an application under S. 8 of the Transfer of Property Act, in January 1912 calling upon the defendant to receive the amount due and to deliver up the title-deeds. This application is Ex. Q. In it petitioner states that he has paid into court the whole of the money due on the mortgage of the A. schedule properties, and asks the defendant to accept the amount and to give him possession of all the properties. Then he makes an alternative request to the effect that if the defendant is willing to receive the principal amount due in respect of the B. schedule properties alone, he may draw out that sum from court and give possession of the B. schedule properties. The reply of the defendant is Ex. R. I will use his own language in referring to it. In paragraph 2 he

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says, "As there is only an offer to pay only the proportionate amount, I am unwilling to accept the same. The petition does not state how much is the proportionate amount, and I am not willing to accept it." In paragraph 5 he says that he is willing to hand over the B schedule lands alone on receiving the whole of the amount of the mortgage due upon the A schedule properties. As the parties were not able to come to terms, the Subordinate Judge passed this order upon the plaintiff's petition: "Counter petitioner refuses to receive the money. Petitioner is referred to a regular suit. This petition is dismissed." Thereupon the present suit was brought. It is admitted that ever since the 9th January 1912 when the money was deposited by the plaintiff, it has remained in court and has not been drawn out by him. In the present suit the plaintiff asked that he should be allowed to redeem the B schedule properties on payment of Rs. 1800 and odd out of the sum of Rs. 3,650 deposited by him. The defendant raised various objections. He stated the same grounds which he put forward in the counter-petition. He also raised the plea that the plaintiff was only a benamidar and as such was not entitled to redeem the property. The Subordinate Judge found all the issues against the defendant and gave a decree to the plaintiff as prayed for. He found that the sum of Rs. 1,852-3-10 mentioned in the plaint was the correct amount payable in respect of the B schedule properties. In appeal the District Judge confirmed the findings of the Subordinate Judge upon all the points except upon the question of interest and mesne profits. He held that the plaintiff was the real owner, and that the defendant is only entitled to the proportionate amount due upon the B schedule properties. But, he was of opinion that the tender was not a valid one and that consequently interest did not cease to run from the date of its deposit in court. That is the main point to be decided by us.

I am unable to agree with the District Judge on the question of the validity of the tender. S. 83 of the Transfer of Property Act says: "........The mortgagor or any other person entitled to institute such suit may deposit......to the account of the mortgagee *the amount remaining due on the* mortgagee." The second paragraph says: The court shall call upon the mortgage by notice to state the amount then due on the mortgage and his willingness to accept the money in full discharge of such amount. The section does not say that nothing more than the amount

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actually due should be paid. Of course if the money deposited is less than the amount payable to the mortgagee, the section will not be satisfied; but where more than the amount due is paid, I fail to see anything in the section to compel me to hold that the amount remaining due has not been paid. The English authorities to which I shall presently refer support the view I have taken. In the earliest case on the subject, *Wade's case* [1] the resolution as it is called, is thus stated: Resolution 3: "A tender of more than is due is good." This decision was followed in *Douglas* v. *Patrick* [2] by a Bench of four Judges including Chief Justice Kenyon. Ashurst, J., said: "There is no doubt that a tender of the greater includes the smaller sum". Buller and Grose, JJ., use almost the same language. These two cases and others were considered in *Dean* v. *James* [3]. Four Judges, of the King's Bench headed by Denman, C. J., accepted the correctness of the earlier decision. Littledale, J., said, "This case falls within the third resolution in *Wade's case* [1] that if a man tenders more than he ought to pay, it is good, for *Omne majus continet in se minus* and the other ought to accept so much of it as is due to him." In *Bevans* v. *Rees* [4] the Chief Baron and three other Barons affirmed the proposition laid down in the earlier case. The Chief Baron said: "I am prepared to say that if the creditor knows the amount due to him and is offered a larger sum and without any objection on the ground of want of change makes a collateral objection, that would be a good tender." I may mention in this connection that there are some curious decisions in the English Courts to the effect that where a debtor on paying a larger sum asks the creditor to take what is due to him and return the balance with a change, that will not be good tender. I have not examined this matter very carefully to see on what principle this exception as regards a claim for change is based. Probably it is due to the idea that the creditor should not be put to any trouble in accepting a tender. I do not think that in this country where we are not obsessed by technicalities of such a narrow description, we shall be justified in accepting a rule that where a person tenders a larger amount and asks for a change, he should not have the benefit of the tender. Apart from this rule as to the claim for a change, the decisions I have referred to, affirm the principle which has been consistently

1. (1601) 5 Coke's Rep. 114.
2. (1790) 3 Term Rep. 683.
3. (1833) 4 B. and Ad. 547
4. (1839) 5 M. and W. 306.

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laid down since *Wade's case* [1]. All these decisions had been given before the Transfer of Property Act was enacted. I feel no doubt that the framers of the Act had these decisions in their mind in drafting the rule as to tender and deposit. It is to be remembered that the rule as to tender is a part of the law as to the performance of a contract. Section 38 of the Contract Act which uses the term 'offer' lays down three conditions. The offer must be unconditional; it must be made at a proper time and place; and the thing offered must be produced for inspection.

So far I have been able to see there are no provisions in any English Act relating to tender. The practice is referred to in Bullen and Leake, pages 710 and 711. There is an analogous provision in the Rules of the County Court.

Now I shall refer to a few Indian decisions which were quoted on behalf of the respondent. All that was decided in *Venkataramayyar* v. *Rangaswami Iyengar* [2] was that a mortgagee should not be compelled before accepting the tender to decide a dispute which has arisen between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption. I do not think this decision is against the view I have enunciated. In *Lal Batcha Sahib* v. *Arcot Narayanaswami Mudaliar* [3] Sir Arnold White, C.J., and Ayling, J., held that an offer to pay such amount as may be due on a settlement of account if the payee would execute an indemnity bond, is not a valid tender. To use the language of the Contract Act, in that case there was no unconditional offer. In *Subbai Goundan* v. *Palani Goundan* [4] where a tender of money which was less by nine pies was made, the learned Judges seem to have held that it was not a valid tender. If I were deciding that case I would have applied the maxim *de minimus non curat lex*; however that may be, the principle that where a man tenders less than what is actually due is not a good tender is the only proposition that must be taken to have been laid down in that case. In *Ayyakutti Mankondan* v. *Periasami Kavandan* [5] it was held by Coutts Trotter and Kumaraswami Sastri, JJ., that where a bond contains a stipulation by way of penalty and the debtor deposits in court what he considers to be reasonable compensation for the penal claim, it is a valid tender.

1. (1601) 5 Coke Rep. 114
2. (1912) 23 M. L. J. 588.
3. (1910) I. L. R. 34 M 320.
4. (1916) 30 M. L. J. 607.
5. (1915) I. L. R. 39 M 579.

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The principle to be borne in mind, especially in this country, is that the parties should be given an opportunity of making a *bona fide* attempt at performing the contract. If that requirement is complied with, the rights of the parties should not be defeated by technicalities. Of course, if the law imposes conditions, we are not at liberty to disregard them on the ground that they are against justice. I am of opinion that the tender in January 1912 was valid. At any rate so far as the ceasing of interest from the date the defendant was served with the summons in the present case, is concerned, I entertain no doubt about it. The defendant was informed by the plaintiff that the money was already in court; he was told what the exact sum was which was due and payable to him; he was further told that he could draw that amount from court. The courts below have found that the exact amount mentioned in the plaint was the sum which was payable to the defendant and nothing more.

Under these circumstances, the principle of O. 24, R. 3 of the Civil Procedure Code applies, and the plaintiff is entitled to interest after the date of the service of the plaint and the summons on the defendant. I would modify the decree of the lower Appellate Court by giving interest to the plaintiff from the date of the service of the plaint and summons on the defendant. The parties are entitled to proportionate costs in this court and in the court below.

Napier, J.

*Napier, J.*:—I have found some difficulty in holding that there was a deposit within the meaning of S. 83 of the Transfer of Property Act, for, in my opinion, the petition which was filed with the deposit was not a petition contemplated by the section. The section requires that the mortgagor should deposit to the account of the mortgagee the amount remaining due on the mortgage, and that thereupon the court should give written notice to the mortgagee, and he, on presenting a petition stating the amount then due on the mortgage and his willingness to accept the money so deposited, is entitled to receive the money. Now, the appellant, according to the language of his petition, sought something different. He asked the court to pass an order "directing the counter petitioner to hand over all the said othi lands with the produce to the petitioner on receiving the othi amount of Rs. 3,650, or directing the counter petitioner to hand over the lands (along with the produce) bought in auction on receiving the proportionate amount, making the counter

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petitioner liable for the costs and granting other reliefs." This petition is clearly not contemplated by the Act. This court has, under its power to make rules given by S. 104 of the Act, framed rules for the Original Side which, though not applicable to the present case, indicate the scope of the section. They require that the mortgagor should file an affidavit stating the facts of the case and in addition to depositing the amount due on the mortgage, deposit in court a sum sufficient to provide for the costs of the mortgagee etc. They do not contemplate the exercise by the court of any discretion in the matter of making either party liable for costs or granting any relief. I am clear, therefore, that if the court had refused to take any action on this petition the proceeding purported to be taken under Section 83 would have been bad. However, the court did give notice to the mortgagee and I must take it that it treated the application as being in proper form. The mortgagee did not take objection that the mortgagor had not deposited the amount remaining due on the mortgage so as to enable him to decide whether he would accept the money so deposited in full discharge of the amount as calculated by him. Just as it was the duty of the mortgagor to deposit the amount remaining due, so it was the duty of the mortgagee to state the amount then due on the mortgage. It appears to me that if he had stated the amount as some figure under the whole othi amount and had claimed to receive that amount out of the total amount deposited, he would have been entitled to do so. It is on this footing alone that I can find that proportionate amount on such properties was, in fact, deposited. If the petition was to be read as requiring the court to ascertain what the proportionate amount was, I should certainly hold that there was no proper deposit; but in the view that the petition left it to the mortgagee to take whatever sum, under the total amount, which he thought he was entitled to as proportionate, I am not prepared to say that the deposit was not good. I agree with the order of my learned brother.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

A.K.T.K.M. Sankaran Nambudripad ... *Appellant** (*Plaintiff*).

*v.*

S. N. Ramaswami Aiyar and others ... *Respondents* (*Defendants*).

Sankaran Nambudripad v. Ramaswami Aiyar.

*Land Improvement Loans Act* (*XIX of* 1883) *Ss. 4 and 7* (*1*) (*c*)—*Loan for improvement, what is—Sale of land if free of prior incumbrances—Madras Revenue Recovery Act* (*II of* 1864) *S.* 42—*Proviso to a section, effect of.*

The provisions of S. 42 of the Madras Revenue Recovery Act (II of 1864) apply to a sale under S. 7 (1) (*c*) of the Land Improvement Loans Act and a sale of land under the provisions of the latter enactment is free of all prior incumbrances.

*Ramachandra* v. *Pitchai Kanni* [1], *Chinnasami Mudali* v. *Tirumalai Pillai and Secretary of State* [2], *Secretary of State* v. *Pisipati Sankarayya* [3], referred to.

A loan which was applied for and obtained for the purpose of effecting an agricultural improvement does not cease to be such simply because the borrower started the "improvement" before he actually received the loan from the Government or because a second instalment of the loan was disbursed by the Government when the first had not been fully utilised within the time prescribed by the rules framed by the Government.

The words of a proviso cannot be used to extend the operation of the section to which it is attached. But where there is doubt as to the true meaning of the substantive part of a section, it is legitimate to look to the words of a proviso, in order to determine the proper interpretation of the section.

*West Dearby Union* v. *Metropolitan Life Assurance Society* [4], relied on.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 148 of 1915.

*C. V. Ananthakrishna Aiyar* and *P. V. Parameswara Aiyar* for Appellant.

*The* (*Acting*) *Government Pleader* v. *Ramesam* for Respondents.

The Court delivered the following

Ayling, J.

**Judgments**:—*Ayling, J*:—The main point for our disposal in this appeal is the general question raised in the single issue framed, whether the provisions of S. 42 of Madras Act II of 1864 apply to a sale under S. 7 (1) (c) of the Land Improvement Loans Act (XIX of 1883): in other words, whether such a sale is free of prior encumbrances.

The Subordinate Judge has decided that it is: and in my opinion, he is right. The point is not covered by authority as the cases quoted on appellant's side (*Ramachandra* v. *Pitchaikanni* [1] and *Chinnaswami Mudali* v. *Tirumalai Pillai and the Secretary of State for India* [2]) all relate to sales under clause (a)

* A. S. No. 377 of 1916. 29th January, 1918.

1. (1884) I. L. R. 7 M 434.
2. (1901) I. L. R 25 M. 572.
3. (1910) I. L. R. 34 M. 493.
4. (1897) A. C. 647.

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(and not clause c) of section 7 (1). A comparison of the various clauses a,b,c, and d shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands whether belonging to the defaulter or some one else. The same distinction was present to the minds of the learned Judges in the earliest of the above cases *Ramachandra* v. *Pitchaikanni*.[1] After referring to various sections of the Revenue Recovery Act they say, "the intention is clear that the purchase is free of prior encumbrances, only when the arrear is of a public revenue of which the land is the first security by statutory declaration"; and again, "arrear of abkari revenue is not due upon any specific land owned by the abkari renter." This, in fact, seems to be the main ground on which their decision is based. The judgment in *Chinnasami Mudali* v. *Tirumalai Pillai and the Secretary of State for India*[2] also draws the same distinction. The above decisions are therefore of no help to appellant in the present case, and indeed indirectly tend to a conclusion adverse to him.

The learned vakil for appellant has argued that the words "in all or any of the following modes" and "as if" contained in S. 7 have reference solely to procedure and were not intended by the Legislature to import the operation of S. 42 of the Revenue Recovery Act. The weak point in this argument is that he is unable to indicate (and we are unable to detect) any difference between the procedure laid down for bringing to sale the lands on which arrears of land revenue have accrued, and other lands liable to sale for the same arrears. On this view, the inclusion of a special clause (c) is unexplained.

In this connection, reference has been made to a decision of this court in the *Secretary of State for India in Council* v. *Pisipati Sankarayya*[3] in which Miller and Munro, JJ., held that all sales of land for arrears of land revenue were free of encumbrances, whether the lands sold were those on which the arrears accrued or other lands belonging to the defaulter. It may be argued that on this view of the law the enactment of clause (c) in addition to clause (a) is in any case unnecessary. I think the explanation lies in the fact that the Land Improvement Loans

1. (1884) I. L. R. 7 M. 434. 2. (1901) I. L. R, 25 M. 572.
3 (1910) I. L. R. 34 M. 498.

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Ayling, J.

Act is an Act of the Government of India and that there is no reason to suppose that it was framed with sole regard to the provisions of the Madras Revenue Recovery Act. Other Revenue Recovery Acts in force in 1883 recognised a distinction between the conditions of sale of land on which arrears had accrued and other lands belonging to the defaulter : Vide Ss. 11 and 12 of Bengal Act (VII of 1868), Ss. 94 (f) and (g) and 108 of the Central Provinces Land Revenue Act (XVIII of 1881) and Ss. 133 and 135 of Act XVII of 1876 Oudh Land Revenue Act. Even assuming, therefore, that the framers of the Land Improvement Loans Act shared the view of the Madras Act II of 1864 taken by the learned Judges in *The Secretary of State for India in Council* v. *Pisipati Sankarayya* [1], this is not inconsistent with their having deliberately distinguished the cases, having in mind the provisions of the Acts in force in other parts of India. Even in this Presidency, so far as I am aware *The Secretary of State for India in Council* v. *Pisipati Sankarayya* [1] was the first case in which the broader view of the applicability of section 42 was expressed; and, with all respect to the learned Judges in that case, I am inclined to think the learned Judges, who decided *Ramachandra* v. *Pitchakanni* [2] were inclined to take the narrower view. There is no reason to suppose that the framers of section 7 of the Land Improvement Loans Act acted under the impression that there was no difference in this respect.

I am inclined to think that while the words " in all or any of the following modes", if they stood alone, might be indicative only of procedure, some wider meaning should be attached to the words, " as if " in clause (c) when contrasted with the words "according to the procedure &c." in clause (d). The use of the latter words is significant and shows at any rate, that the framers of the Act had other words in their minds, which might have been more equitably employed to express the meaning contended for by appellant's vakil.

There is, however, another argument, to my mind conclusive on the point, furnished by the proviso to the section, which runs : "provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on,

1. (1910) I. L. R. 34 M 493. 2. (1884) I. L. R. 7 M. 408.

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that interest, and, where the loan is granted under section 4 with the consent of another person, the interest of that person, and of mortgagees of, or persons having charges on, that interest".

This clearly implies that the interests of prior mortgagees are affected by a sale under clause (c) and is in fact incapable of any other meaning. Mr. C. V. Ananthakrishna Aiyar's only argument in this connection is that the words of a proviso cannot be used to extend the operation of the section to which it is attached. This is no doubt true, and is clearly established by the judgment of the Privy Council in the case on which he mainly relies *West Derby Union* v. *Metropolitan Life Assurance Society* [1], but where there is doubt as to the true meaning of the substantive part of a section, it is surely legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. This is recognised by Lord Herschell in his judgment in the very case referred to. It cannot be said that the words of the main part of the section read so clearly in appellant's favour as not to be at any rate, ambiguous: and here we have a proviso which is perfectly compatible with one interpretation, and clearly incompatible with another. It must also be noticed that one main objection of their Lordships to reference to provisos is inapplicable to the present case: viz., that provisos are frequently inserted simply to allay the apprehensions of persons against whom the Act was never intended to apply. This cannot be said of the exception against mortgagees which is contained in the proviso itself. There is nothing as far as I can see in the judgment of their Lordships in that case to preclude reference to the proviso for the interpretation of the section with which we are dealing: and it seems to me to be conclusive against appellant.

I must therefore hold that a sale of land under Section 7 (1) (c) is free of encumbrances.

P. 11 Two other objections raised on behalf of appellant may be briefly noticed. It is pointed out that Rs. 2,500 of the first instalment advanced was devoted to discharging a loan privately taken for the purpose of paying for an oil engine, the installation of which on the land was part of the improvements for which the loan was granted. Appellant contends that to this extent the loan from Government cannot be said to have been taken for the purpose of making an improvement within the meaning of

1. (1897) A. C. 647.

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section 4 of the Act. No authority is quoted and I am unable to accept such a contention. A considerable time usually elapses between the application for a loan under the Act, and its disbursement to the borrower: and in the present case the borrower being anxious to set about the work, arranged to purchase the engine on the hire purchase system, and apparently took a temporary loan from some private person to enable him to discharge the earlier instalments. There is nothing in all this to affect the essential object for which the loan was taken from Government or the borrower's liability under the Act.

The second objection is that, because the first instalment of the loan was not utilised within the period allowed by the Government rules, the disbursement of the second instalment cannot be treated as the disbursement of a loan under the Act, and to the extent of that instalment no priority can be claimed for it over plaintiff's mortgage. This contention is also baseless: it is not denied that the first instalment had been utilised to the satisfaction of the Government officers on the specified improvements prior to the disbursement of the second instalment: and I fail to see how the action of Government in relaxing the strict operation of the rule regarding the time limit in favour of the borrower can prejudicially affect Government's right in this connection.

I would dismiss the appeal with costs of second respondent.

Seshagiri Aiyar, J.

*Seshagiri Aiyar, J*:—Although I agree with the conclusion at which my learned brother has arrived, having regard to the fact that the point argued is practically one of first impression and to the important issues involved in its decision, I have ventured to add a few words of my own.

The facts have been stated by my learned colleague and it is unnecessary to repeat them.

The main point for consideration is whether a sale for the loan advanced by the Government in respect of agricultural improvement of a property avoids previously existing encumbrances upon that property. I do not agree with Mr. C. V. Ananthakrishna Aiyar that unless the loan is advanced for making future improvements, the provisions of the Act have no application. Where in anticipation of a loan from Government, work which satisfied the definition of the term 'improvement' is started, in my opinion, the loan must be taken to have been granted for th

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purpose of making the improvement. The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property. Nor do I think that the fact that time was extended for completing the work in regard to which the first instalment of payment was made, in any way affects the validity of the subsequent advances. The provision in the rules for the completion of the work within the time stipulated is minatory in its nature and is as much open to the Government to extend the time for performance as it is open to any private party to do in respect of contracts fixing a time for performance. The rules do not bind the Government to refuse the loan if the time stipulated has been exceeded.

On the main question, I have been greatly influenced by the contention of the learned Government Pleader on the inutility of clause (a) of Act XIX of 1883. If clause (c) of that section is intended to have the same result as clause (a) I am prepared to agree with the learned Vakil for the appellant, that the words, "as if they were arrears of land revenue" would *prima facie* only attract the procedure prescribed in the Revenue Recovery Act and not the substantial declaration contained in sections 2 and 5 of that Act. The decisions of this court have been uniform on that question. See *Ramachandra* v. *Pitchakanni* [1], *Ibrahim Khan Sahib* v. *Rangasami Naicken* [2], *Kadir Mohideen Marakayar* v. *Muthukrishna Aiyar* [3], and *Muthusami Aiyar* v. *Sri Sri Methanithi Swamier* [4]. But in cl. (c) of S. 7 we have in addition to the words, "as if they were arrears of land revenue," a preceding and a subsequent clause which give a different complexion to the policy of the Act. The first four words 'out of the land,' and the last five words 'in respect of that land,' make it clear that the loan granted is to be regarded as a first charge upon the property. In *Ramachandra* v. *Pitchakanni* [1] which was under the Abkari Act two eminent Judges of this court while holding that the words, "in like manner as for the recovery of arrears of land revenue" only denoted the procedure to be adopted, say, "Arrear of abkari revenue is not due upon any specific land owned by the abkari renter." That, to my mind, is the key-note to the construction of

1. (1884) I. L. R. 7 M. 434, 2. (1905) I. L. R. 28 M. 420.
3. (1902) I. L. R. 26 M. 230. 4. (1913) I. L. R. 38 M. 356.

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similar provisions in other Acts. In the case of abkari rent, in the case of income-tax, in the case of cesses under the Local Boards Act, the amount payable to the Government is not due in respect of any specified land, whereas the essence of the stipulation under Act 19 of 1883 is that the loan is payable out of and in respect of the land for improving which the loan is granted. In my opinion, the language of S. 7 clause (c) amounts to a declaration that the land is charged with the payment of the revenue and when in addition to that declaration the legislature refers back to Act II of 1864, I am inclined to think that the provisions of Ss. 2, 5, and 42 of that Act are intended to be read with clause (c) of S. 7 of Act XIX of 1883. Whatever doubt there may exist on this question, is removed by the proviso, which in distinct terms says that the interest in the land which is available to the Government is restricted to that of the borrower and to that of the mortgagee.

Mr. C. V. Ananthakrishna Aiyar addressed to us an elaborate argument upon the inadmissibility of utilising provisos to supplement the operative portion of a section. I adhere to what I said on this question in my judgment in *In Re Mrs. Besant* [1]. It is a well known canon of construction that where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section; but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. The observations of Lord Watson in *West Derby Union v. Metropolitan Life Assurance Society* [2] to which the learned Government Pleader drew our attention support this principle and there is nothing in the judgment of the other noble lords to throw doubt on the correctness of the dictum of Lord Watson. In my opinion, the proviso is strictly and rightly in place in this particular instance. By the operative portion of clause (c) the legislature provided that out of the whole land the loan shall be realised. The proviso releases rights other than those of the borrower and of the mortgagee *e. g.*, the rights of an occupancy tenant. Therefore the proviso is aptly in place and has the further effect of elucidating the meaning of the operative clause.

1. (1916) I. L. R. 39 M. 1164 at 1195. 2. (1898) A. C. 647.

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There is only one other observation that need be made, and that is this: S. 7 provides for cumulative remedies to the Government; it is open to the Government to proceed against the borrower personally; they may proceed to sell the land; lastly, they may also proceed to sell the land given as collateral security. Now, under clause (a) when the legislature provided that the borrower can be proceeded against personally it would follow as a matter of course that his property can be attached and sold. It seems to me that even where properties other than those upon which revenue is due are sold under Act II of 1864 all pre-existing encumbrances on such properties are wiped off. During the course of the argument I felt some little doubt as to whether the decision of Justices Miller and Munro in *The Secretary of State for India in Council* v. *Pisipati Sankarayya* [1] was right. But, on closely examining the sections of the Revenue Recovery Act, I feel that the effect of S. 42 is not only to discharge pre-existing encumbrances upon the property on which the arrear is due, but also pre-existing encumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. S. 32 to which Mr. C. V. Ananthakrishna Aiyar drew our attention does not save the encumbrances as was contended. Therefore if the Government avail themselves of the remedy provided by clause (a) and if the words, "as if they were arrears of land revenue", were to be construed as only indicating the procedure to be adopted then it would follow that the previously existing encumbrances would subsist and that the Government would only be entitled to the surplus sale proceeds, if any, after satisfying such encumbrances. If clause (c) is also to be similarly interpreted the legislature must be deemed to have been guilty of redundancy. According to Mr. Ananthakrishna Aiyar, under clause (c) also, if a sale is effected for the loan the encumbrances would still subsist. I do not think courts will be justified in imputing to the legislature the enacting of an unnecessary provision of law where they can give a consistent meaning to it otherwise. It is clear, whereas under clause (a) the ordinary remedy is given, under clause (c) the remedy of avoiding existing encumbrances is provided by the legislature. At first sight it looks as if the legislature was not conscious that under the Madras Revenue Recovery Act that sales of property other than those upon which arrears are due would

1. (1910) I. L. R. 34 M. 493.

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not avoid the existing encumbrances. Very likely the Imperial Government had in mind the provisions of Bengal Act 7 of 1868 which by S. 11 enables the Collector to sell only the tenure on which the rent is due and by S. 12 to exclude previous encumbrances only in respect of that particular tenure. The Madras legislature has given a more drastic remedy for arrears of revenue than is given in Bengal. However that may be, there can be no doubt that the effect of S. 7 clause (c) is to make a declaration on behalf of the Government that it has a first charge upon the property for the loan advanced in respect of that property, just as under S. 2 of the Revenue Recovery Act the Government has a first charge for arrears of revenue. In this view, the decision of the Subordinate Judge is right, and I agree that the appeal should be dismissed with costs of the 2nd respondent.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Srinivasa Ranga Row Pantulu (died) by the Official Assignee, High Court, Madras and another. *Appellants.* (Petitioner and his L. R.)*

*v.*

Raja Kumara Venkata Perumal Rajah Bahadur Varu, minor Rajah of Karvetnagar by his guardian Mr. W. A. varadachariar. *Respondent (Counter Petitioner.)*

Srinivasa Ranga Row v. Raja Kumara Venkata Perumal.

*Madras Court of Wards Act I of 1902, S. 41—Ss. 45 and 47—Construction—Applicability—Unnotified claims—Rights of secured creditors—Applicability of provisions of section to executing Courts, including Decree-Collector—Civil Procedure Code of* 1882 *Ss. 321-325 (c)—Effect.*

The cessation of interest provided for by S. 41 of the Court of Wards Act in the case of a claim which has not been duly notified is final and the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

In the case of secured creditors who have not notified, S. 41 only prohibits payments to them by the Court of Wards and out of the unincumbered funds at its disposal and does not prohibit the realisation of the security and the satisfaction out of the proceeds of the secured creditor's claim

The prohibition of payment in S. 41 of the Act must be confined to the Court of Wards and does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. And, when the Local Government exercises its power under S 45 of the Act of transferring decrees

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* L. P. A. No. 266 of 1916. 19th September, 1917.

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against the Ward to the Collector for execution, the provisions of S. 41 as to order of payment do not affect the Decree-Collector, as he is called, in the discharge of his duties under Ss 321-325 (c) of the Civil Procedure Code of 1882 which are made applicable by S. 47 of the Act. The provisions of S. 41 as to the cessation of interest, however, continue to apply even in such cases.

*Depuru Kalappa Reddi* v. *Umadi Rajah* [1], Cons

Appeal under clause 15 of the Letters Patent against the Judgment of the Hon'ble Mr. Justice Oldfield in C. M. A. No. 107 of 1912 preferred against the order of the District Court of North Arcot dated 4th December 1911 in C. M. P. No. 148 of 1911 in E. P. No. 132 of 1905 in O. S. No. 7 of 1894.

The facts of the case necessary for the purpose of understanding the points dealt with in the judgment in the appeal under the Letters Patent were as follows :—

The appeal under the Letters Patent arose out of an application for the execution of a mortgage decree passed in the year 1895. The decree was one passed in favour of a joint Hindu family of 4 persons and against the then zemindar of Karvetnagar. One of the decree-holders became an insolvent and his estate accordingly vested in the Official Assignee of Madras. The Official Assignee brought a suit for a partition of the family properties of the insolvent and got himself appointed Receiver to execute the said mortgage decree. He filed E. P. 132 of 1905 for executing the mortgage decree. Meanwhile the Court of Wards took charge of the Karvetnagar estate in 1899, the then zemindar being declared a ward. On the death of that zemindar, the respondent in the appeal before their Lordships succeeded to the estate and was also declared a ward of the Court of Wards who assumed management again in August 1907, before the execution was carried out. That management continued till January 1910 when the Estate was released under the discretionary power given under the first part of S. 54 of the Court of Wards Act. The usual notification was published by the Collector under S. 37 (1) of the Act in February 1908 calling upon all creditors to notify their debts and a special notice was sent to the Official Assignee. For some reason or other, however, the Official Assignee failed to notify the mortgage decree debt. In December 1911 the District Court held, in the said E. P. 132 of 1905, that under S. 41 of the Court of Wards Act the claim of the Official Assignee to execute his decree should be postponed until after discharge or satisfaction of the claims creditors notified or admitted under S. 38 and that interest should cease from August 1908, *i.e.*, at the expiry of 6 months from the date of notification under S. 37 (1). Against this order an

1. (1911) 1 M. W. N. 75.

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appeal was filed to the High Court by the Official Assignee. The learned Judges, Oldfield and Krishnan, JJ. by whom the appeal was heard did not agree in their opinion as to the scope and effect of S. 41 Oldfield, J. agreeing with the Court below, and Krishnan, J. being for reversing the order of the lower Court. In the result the appeal was dismissed with costs. Against the judgment of Oldfield, J. the above appeal was filed under cl. 15 of the Letters Patent.

*T. Narasimha Aiyangar* for Appellants.

*L. Venkataraghava Aiyar* for Respondent.

The Court delivered the following

Wallis, C. J.

**Judgments**:—*The Chief Justice* :—In construing the provisions of S. 41 of the Court of Wards Act, I of 1902, regard must be had to the scope and object of the amendments introduced into the Madras Court of Wards Regulation V of 1804 by Madras Act IV of 1899 and reproduced without substantial alteration in the Act of 1902. The object was to save the estates of embarrassed proprietors or at least a portion of them for their owners, and it was hoped that with the aid of the additional powers conferred on it the Court of Wards would be able to provide for the full discharge of the proprietor's debts and liabilities. If not, the creditors were left to their ordinary remedies which were only interfered with as expressly provided. Among the powers conferred on the Court of Wards and its Agent, the Collector, specified in the order under S. 19 of the Act, was that of requiring all persons having pecuniary claims on the ward, whether decrees or not, to notify those claims within a specified period, failure to do so being visited with the penalties prescribed by Ss. 41 and 42. With the information thus acquired, and with the aid of further powers of ousting usufructuary mortgagees from possession and converting them for the time into simple mortgagees and of reviving improvident leases, it was hoped that the Court of Wards might find itself in a position to raise sufficient money to discharge all the liabilities. S. 41 imposes two penalties with regard to claims which have not been duly notified. The first of them is that "it shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest" from the expiration of the period prescribed by S. 37," for notifying claims. This threatened loss of interest was a strong inducement to notify claims, and having

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regard to the express provision that interest shall cease even when payable under a decree, and to the absence of any provision as to its again becoming payable except in the event specified in S. 55 (4), I agree with both the learned Judges that, under the section, the cessation of interest is final, and that the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

As regards the second penalty that the unnotified claim " shall not be paid until after the discharge or satisfaction of the claims notified or admitted under S. 38," it may be observed in the present place that the provision cannot be construed as depriving secured creditors of their security or as authorising the application of money raised on their securities otherwise than in satisfaction of their claims. If not paid the secured creditor is entitled to retain his security till he is paid. In these circumstances to hold that the Court of Wards is prohibited by this section from raising money on the security and discharging the secured creditor and applying the surplus in the discharge of the general indebtedness would merely be to prevent the court from raising money for the beneficial purposes specified in S. 323 (3) Civil Procedure Code and would unnecessarily embarrass it in the discharge of the difficult functions entrusted to it without advantage to anybody. This cannot, I think, have been the intention of the Legislature, and I think that therefore we are justified in putting a restrictive construction on this highly general section and holding that in the case of secured creditors who have not notified, it only prohibits payments to them by the Court of Wards and out of the unincumbered funds at its disposal, and does not prohibit the realisation of the security and the satisfaction out of the proceeds of the secured creditor's claim.

If the prohibition of payment in S. 41 is directed to the Court of Wards, it follows of course that it must cease as held by Krishnan, J., when the Court of Wards withdraws from superintendence. I am disposed to think that it must be confined to the Court of Wards, and that it does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. Creditors, whether they have notified or not, are not prevented from obtaining decrees and proceeding to execute them. If the execution is left to the Civil

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Courts, each court must execute the decree before it with due regard to the rights of secured creditors and to the rights of unsecured decree-holders to rateable distribution. It can hardly have been intended that on each occasion of executing a decree the executing court should have to embark on an inquiry as to whether all the notified debts have been paid, and I think that sufficient effect may be given to S. 41 without construing it as affecting the duties of executing Courts, and that if it had been intended to affect them there would have been express provisions to that effect. Again, when the Local Government exercises its power under S. 45 of transferring decrees against the ward to the Collector for execution, I think the same considerations apply and that the provisions of S. 41 as to order of payment do not affect the Decree-Collector, as he is called, in the discharge of his duties under S. 321-325 (c) of the old Code of Civil Procedure which are made applicable by S. 47 subject to the rules prescribed by the Local Government under S. 45 (2) which however apply only to procedure and do not affect the substantive right of the parties. In the case of decrees such as the present obtained by secured creditors ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, the Decree-Collector has the powers conferred upon him by S. 321 and is required by S. 324 A to apply the moneys realized by him, subject to the claims of maintenance holders, in execution of the decree for which the court ordered the sale of the immoveable property, and in the case of other decrees to apply such moneys by way of rateable distribution. Under S. 323 (3) the Decree-Collector is also empowered to discharge the claim of any incumbrancer whether it had matured or not "for the purposes of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance." I do not think that the second part of S. 41 was intended to affect the Decree-Collector as regards these powers and duties.

This is an attempt to execute a mortgage decree passed in 1895. It is stated by the District Judge of North Arcot in his order on the connected E. P. No. 79 of 1912 dated 21-11-12 that the Court of Wards assumed management on 26th July 1899 and gave up management of the estate on 27th September 1905, and that decrees were transferred to the Collector for execution and

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retransferred to the Civil Courts on 27th February 1906. It is, also, stated that the Court of Wards again assumed superintendence on 27th August 1907 and relinquished it on 15th January 1910, but it is not stated that decrees were again transferred to the Collector for execution during that period, and that execution still remains with the Civil Courts. As it is now more than eighteen years since the Court of Wards first took over management and the other secured and unsecured claims have not yet been satisfied, it seems exceedingly unlikely that they ever will be satisfied and, if they are not, the money which has been realised on account of the defendant's security and which is in court must according to the District Judge's order remain there for ever, a result which the Legislature can certainly not have contemplated. In passing the order the learned District Judge relied on a ruling contained in a judgment to which I was a party with Krishnaswami Aiyar, J., in *Depuru Kalappa Reddi* v. *Umadi Rajah* [1], that the provisions of S. 41 are absolute except in so far as they are cut down by S. 55 (3) and Oldfield, J. has also relied on this ruling. That was an appeal against an order in which the District Judge had held that the Zamindari was not liable to be proceeded against for money debts incurred by the previous holder, and the order was reversed on the ground that his view was wrong. Apparently the District Judge's ruling in that case that S. 41 was not applicable when the decree was being executed in the Civil Court, was also questioned before us; and, as to this, I now think we expressed ourselves too broadly, because while I am still of opinion that the provisions of S. 41 as to the cessation of interest continue to apply, I have come to the conclusion on a fuller consideration of the subject that the further provisions of the section are inapplicable for the reasons already given to the present case. In the result we agree with the order proposed by Krishnan, J. Costs of the appeal to abide the result.

*Bakewell, J.*:—I agree.

*Kumaraswami Sastri, J*:—I agree.

A. S. V.

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1. (1911) 1 M. W. N. 75.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE BAKEWELL AND MR. JUSTICE KUMARASWAMI SASTRI.

Asa Beevi and others ... *Appellant** (*Defendants Nos. 5 to 7*)

*v.*

S. K. M. Kuruppan Chetty... *Respondent* (*Plaintiff.*)

Asa Beevi v. Karuppan Chetty.

*Mahomedan Law—Inheritance—Right of—Transfer or Renunciation before Vesting—Validity.*

A transfer or renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law.

*Kunhi Mamood* v. *Kunhi Moidin* [1], not followed.

*Musst. Hurmut-Ool Nissa Begam* v. *Allakhia Khan* [2], Explained and Distinguished

Appeal under Clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Sadasiva Aiyar dated the 7th February 1917 in S. A. No. 1471* of 1915 preferred against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in A. S. No. 301 of 1914 preferred against the decree of the Court of the Additional District Munsif of Sivaganga in O. S. No. 96 of 1913.

The facts of the case necessary to understand the judgment in the appeal under the Letters Patent were shortly as follows :—

One P, a Mahomedan, died leaving behind him M, a son, and N, a daughter, by his predeceased 1st wife, and his second wife. During the life-time of P, M and his mother executed a release deed in his favour releasing their rights of inheritance to P. Subsequently P. died leaving behind him, as stated above, M. N, and his second wife. M. and N. sold their father's properties to the plaintiff in the suit out of which arose the appeal before their Lordships as if they were his sole heirs ignoring the release deed and ignoring the existence of the 2nd wife. Defendants in the suit claimed the suit property through the 2nd wife. In a suit by plaintiff for recovery of the properties purchased by him the defendants pleaded that M. had no interest to convey by reason of his having executed the release deed mentioned above. Plaintiff, on the other hand, contended, that both under the Mahomedan law and by and on the analogy of S. 6 of the Transfer of Property Act the release was legally inoperative and did not affect M's rights to the properties of P. The Munsif held with the defendants but the Subordinate Judge, on appeal, held otherwise. On second appeal to the High Court

* L. P. A. No. 47 of 1917. 12th September, 1917.

1. (1896) I. L. R. 19 M. 176. 2. (1871) 17 W. R. (Civil) 108.

against the decree of the Subordinate Judge, Sadasiva Aiyar, J. agreed with the court below in holding that the release was invalid and inoperative, but Spencer, J. held following a decision of the Privy Council in 17 W. R. 108 that the release was not invalid under the Mahomedan Law. Under S. 98 of the Code of Civil Procedure the judgment of Sadasiva Aiyar, J. prevailed and the second appeal was dismissed with costs. The above appeal was filed under Cl. 15 of the Letters-Patent against the judgment of Sadasiva Aiyar, J.

*A. Krishnaswami Aiyar* and *E. Duraisami Aiyar* for Appellant.

*C. V. Ananthakrishna Aiyar* for Respondent.

The Court delivered the following

**Judgment**:—We agree with the conclusion arrived at by Mr. Justice Sadasiva Aiyar in this case on the ground that a transfer of an expectancy of this kind is not permitted by the Muhammadan Law. That was decided in accordance with the opinion of the numerous law officers consulted in *Mussammat Kanum Jan* v. *Mussamat Jan Beebee* [1]. Case No. 11 cited at p. 89 of the MacNaughten's Principles and Precedents of Muhammadan Law is to the same effect. This view has also been taken by the text writers on Muhammadan Law (Sir Roland Wilson's Digest of Anglo-Muhammadan Law, page 268, and more particularly Volume II, pages 50 and 51 of the 3rd Edition of Mr. Ameer Ali's Muhammadan Law where the subject is more fully dealt with). Mr. Tyabji's Principles of Muhammadan Law is to the same effect. On the other hand, reliance has been placed mainly on the decision of the Privy Council in *Mussammat Hurmutool-Nissa Begam* v. *Allahdia Khan* [2], by which Mr. Justice Spencer appears to have been mainly influenced in dissenting from the conclusion come to by Mr. Justice Sadasiva Aiyar. On examining that case, we do not think that their Lordships intended to lay down that a Muhammadan could renounce his rights of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed. In that case there had been very great delay in putting forward the plaintiff's claim to succeed as heir of the deceased and their Lordships observe at page 112, " They may further remark that, according to the Muhammadan Law, there may be a renunciation of the right to inherit and that such a renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another". Having regard to the words " right to

1. (1827) 4 S. D. A., (Beng) 210. 2. (1871) 17 W. R. (C. R.) 108.

Asa Beevi v. Karuppan Chetty.

inherit" and the words "prosecuting a claim" which claim would only arise after the succession had opened, we think that these observations of their Lordships may be taken as dealing with a renunciation after the right of inheritance has vested, and are not authority for the proposition that a prior renunciation is authorised by the Muhammadan Law. Mr. Ameer Ali in the passage referred to deals with renunciation after the inheritance has vested.

Reliance has also been placed on a decision of this court reported in *Kunhi Mamod* v. *Kunhi Moidin* [1]. That decision has been questioned by all the text-book writers who have since dealt with the subject. As pointed out in Wilson's book, the recital that all the law officers were not agreed in the case in *Mussammat Kanum Jan* v. *Mussammat Jan Beebee* [2] is not accurate. Further, the respondent was not represented and therefore the case was not so fully argued. The learned Judges also proceeded upon the footing that the right of inheritance had vested. We are not prepared to accept this case as an authority for the proposition that under the Muhammadan Law a right of inheritance can be renounced before it vests. The decision in *Mussammat Kanum Jan* v. *Mussammat Jan Beebee* [2] has since been referred to with approval by this court in the judgment of Benson and Sundar Aiyar, JJ. reported in *Marangarni Rowthen* v. *Nagur Meera Labbai* [3] and the same view appears to have been expressed by Sir Lawrence Jenkins, C. J. in *Sumsuddin* v. *Abdul Husein* [4], though the judgment in that case proceeded upon the onstruction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision, *Muhammad Hashmat Ali* v. *Kaniz Fatima* [4], but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act and it is therefore unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of S. 6 of the Transfer of Property Act itself.

For these reasons, the Letters Patent appeal fails and is dismissed with costs.

A. S. V.

1. (1896) I. L. R. 19 M. 176=6 M. L. J. 62.
2. (1827) 4 S. D. A. (Beng.) 210.
3. (1912) 24 M. L. J. 258.
4. (1906) I. L. R. 31 B. 165.
5. (1915) 13 A. L. J. 110.

## PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, SIR JOHN EDGE, SIR WALTER PHILLIMORE, BART., AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court of Judicature at Madras.]

C. Ganapathy Mudaliar ... *Plaintiff*-Appellant.*

*v.*

N. Krishnamachariar and others ... *Defendants-Respondents.*

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Ganapathy Mudaliar *v.* Krishnamachariar.

*Mortgage—suit for sale—decree for sale—sale under decree not in compliance with Transfer of Property Act—whether such sale bars mortgagor's right to redeem—Transfer of Property Act,* 1882 (*Act IV of* 1882) *ss.* 60, 88, 89—*Questions arising between auction purchaser at sale under mortgage decree and mortgagor to be decided in execution and not by regular suit—Code of Civil Procedure,* (*Act* 14 *of* 1882) *S.* 244.

In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by ss. 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold, and purchased (with the permission of the Court) by the decree-holder. The sale was confirmed. The mortgagor thereafter sued for redemption.

*Held*, that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent Court, and such decree had not been appealed, it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with, those defendants were debarred from a right to redeem.

*Held*, also that the present suit was barred by S. 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and should have been raised before the sale was confirmed and if so raised would have been decided by the Court executing the decree.

*Prasunna Coomar Sanyal* v. *Kasi Das Sanyal* [1] followed.

Appeal from a decree of the Madras High Court (Miller and Tyabjee, JJ) dated February 17, 1914, affirming a decree of the District Judge of North Arcot.

One Kumaraswami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property : (1) in 1876 in favour of Varadappa, (2) in 1879 in favour of a vakil named Vijayaraghavachariar and (3) on the 10th May 1881 in favour of Narasingha. Subsequently two sons were born to the mortgagor, namely, the plaintiff-appellant and his brother since deceased, in 1881 and 1882 respectively. The first and third mortgages were assigned to the vakil. Subsequently the vakil sued on the third mortgage for sale of the mortgaged property, and made the father and his two sons defendants. At the trial the father objected that he was not the guardian of his two sons

* 12th and 13th November, 1917.

1. (1892) L. R. 19 I A 166.

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but the Judge overruled the objection and made a decree dated 15th April 1886 for sale of the mortgaged property. On the 16th August 1886 the decree-holder applied for execution by attachment and sale of the mortgaged property. On the 28th September 1886 Govindaraju, an uncle of the minors, applied to be appointed guardian of the minors and for an order setting aside the decree, on the ground that the minors were not represented. The Court granted the application and ordered a new trial. But Govindaraju did not file any written statement and the case was heard *ex parte* and the Court made a decree, dated 15th November 1886, against the defendants for sale of the mortgaged property. On further proceedings under the application of the 16th August 1886 the properties were subsequently sold in execution and were purchased by the decree-holder with the leave of the Court. The plaintiff's father died in 1894 and in 1904 the plaintiff obtained the release of his brother's rights and instituted the present suit in 1907 to redeem all the three mortgages in suit. The District Judge held that the plaintiff was properly represented and was bound by the decree and by the execution proceedings and that the suit was barred by section 244 of the Code of Civil Procedure, 1882. Plaintiff's appeal to the Madras High Court was dismissed. [See 27 M. L. J. 213 for a full report of the case.] He thereupon preferred the present appeal to the Privy Council.

*Sir W. Garth* for appellant.

*Sir Erle Richards, K. C.*, and *Kenworthy Brown*, for respondents 1 to 5 (representatives of the mortgagee, who had died).

The remaining respondents, who had purchased portions of the mortgaged property from the mortgagee, did not appear.

*Sir William Garth*, for appellant: The minors here were not parties to the sale proceedings. The sale was in execution of the decree dated April 15, 1886: it was only under that decree that attachment was made on the application of August 14, 1886. But that decree was set aside: and in the subsequent proceedings the minors were described as under the protection of their father: they were not properly on the record and are not bound: *Khirajmal* v. *Daim* [1]; *Musammat Bashir-un-nissa* v. *Muhammad Ismail Khan* [2].

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1. (1904) L. R. 32 I. A. 23, 33=I. L. R. 32 Cal. 296.
2. (1909) L. R. 36 I. A. 168=31 All. 572.

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In any case the right to redeem has not been extinguished. Under S. 60 of the Transfer of Property Act that right continues until it is extinguished by act of the parties or by order of a court. The right can only be barred if certain steps are taken under the Act, and those steps have not been taken—Transfer of Property Act, 1882, Ss. 58, 60, 85, 86, 88 and 89. There is no authority for the proposition that the mere sale under a decree bars the right to redeem, even though the provisions of the Act have not been complied with. Reference was made to *Mallikarju Naidu* v. *Lingamurti* [1].

*Richards, K. C.*, for respondents 1 to 5 :—A sale of ancestral property in execution of a decree conveying the right, title and interest of the father of a joint family is binding on the sons. *Sripat Singh* v. *Tagore* [2]. The minors were properly represented and the second decree of the 15th November was substituted for the first decree on the 15th April. The attachment and sale really took place under the second decree. Govindaraju was fully aware of the pending sale. In any case the plaintiff was a party to the retrial of the suit, and is bound by the decree and the execution proceedings therein. A separate suit is barred by S. 244 of the Code of Civil Procedure, 1882. *Prasunna Coomar Sanyal* v. *Kasi Das Sanyal* [3] is conclusive on the point. The questions now raised could and ought to have been raised before the sale was confirmed under the section.

*Garth in reply* :—The sale really took place under an attachment made under the first decree. In order to see what was sold at a judicial sale the Court must look at the proceedings which culminated in the sale. *Thakur Barmha* v. *Jibanram* [4]. S. 244 of the Code has no application because the minors were not parties to the execution proceedings and were not properly represented therein.

Their Lordships' judgment was delivered (December 14, 1917) by

Sir John Edge

*Sir John Edge* :—This is an appeal from a decree of the High Court at Madras, dated the 17th February, 1914, which affirmed a decree, dated the 9th February, 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

1. (1902) I. L. R. 25 Mad. 244=12 M. L. J. 279.
2. (1916), L. R. 44 I. A. 1=32 M. L. J. 133=44 C. 524.
3. (1892) L. R. 19 I A. 166.
4. (1913) L. R 41 I. A. 38, 43.

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The suit was brought in the Court of the District Judge of North Arcot on the 16th November, 1907, to redeem three mortgages dated respectively the 12th December, 1876; the 7th January, 1879; and the 10th May, 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January, 1879, was in favour of N. Vijayaragavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December, 1876, and the 10th May, 1881, vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March, 1886, the vakil brought in the District Court of North Arcot, a suit for sale on the mortgage of the 10th May, 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the Court as Original Suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and on the 15th April, 1886, made a decree in the following terms:—

"It is ordered that plaintiff do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of "The Transfer of Property Act, 1882," but did not comply with those provisions.

On the 16th August, 1886, the vakil presented to the District Court his petition, under section 23_ of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April, 1886. The petition was entered on the files of the Court as "Execution Petition No. 57 of 1886 in O. S. (Original Suit) No. 5 of 1886," and by it the petitioner prayed "that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed." In that petition the present plaintiff and his brother were described as minors, defendants "by their guardian the first defendant." In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December,

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1876, and the 7th January, 1879. On the 18th August, 1886, the warrant of attachment was issued, and on the 13th September, 1886, a notice of sale was issued.

On the 28th September, 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April, 1886, set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt in respect of which the mortgage of the 10th May, 1881, had been given was not one which the minors or the properties were liable to discharge. On the 10th November, 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April, 1886, as against them. Govindaraju was ordered to put in a written statement on the 15th November, 1886, on behalf of the minors, but he failed to do so and did not appear. On the 15th November, 1886, the District Judge made a decree that the plaintiffs (the vakil) "do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally and by sale of the mortgaged property". That decree did not comply with the provisions of "The Transfer of Property Act, 1882," but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of 15th April, 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the Court of the District Judge caused a proclamation of the intended sale to be made under S. 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in O. S. No. 5 of 1886, application No. 57 of 1886, and proclaimed that—

"Whereas the immoveable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September, 1887, and that in that sale the right, title, and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August, 1886.

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It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in Original Suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immoveable properties in question were sold subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother, and their father, had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title, and interest in the property

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of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title, and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to the suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of "The Transfer of Property Act, 1882," were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It appears to their Lordships that the answer to that contention is that whether or not the provisions of "The Transfer of Property Act, 1882," were complied with, property and all right, title, and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that :—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely) :—

"(c.) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prasunna Coomar Sanyal and another* v. *Kasi Das Sanyal and others* [1] that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November, 1886.

1. (1892) L. R. 19 I. A. 166.

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Their Lordships will humbly advice His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

Solicitor for appellant.—*Douglas Grant.*

Solicitor for respondents.—*Chapman Walker and Shephard*

A. P. P.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR JUSTICE NAPIER.

Lakshmanan Chetty and others ... *Petitioners,** (*Appellants in A. S. No. 350 of 1917 on the file of the High Court.*)

*v.*

P. P. V. Palaniappa Chetty and others. ... (*Respondents Nos. 1 to 3 in do.*)

Lakshmanan Chetty v Palaniappa Chetty.

*Civil Procedure Code, Or. 41 Rr. 5 & 6 (2)—Application for stay of sale—Whether lies in an appellate court.*

An appellate court has power under Or. 41 R. 5 of the Civil Procedure Code to stay the sale of immoveable property ordered by the lower court on an application made to such appellate court.

The inherent powers of the appellate court clearly recognised by Or. 41 R. 5 cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing court by Or. 41 R. 6 which rule seems to have been clearly intended in order that the executing court might be compelled to exercise it in emergent cases for the benefit of the judgment debtor. *Kanniappa Chetty* v. *Manikavasakam Chetty.* [1] dissented from.

*Tribeni Sahu* v. *Bhagmat Bux* [2] and *Rama Prasad* v. *Anukul Chandra* [3] ref. to.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of further proceedings in execution of the decree by way of confirmation of sale in O. S. No. 75 of 1914 on the file of the court of the Temporary Subordinate Judge of Ramnad at Madura pending the disposal of A. S. No. 350 of 1917 preferred to the High Court against the decree of the court of the Temporary Subordinate Judge of Ramnad at Madura in O. S. No. 102 of 1916.

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* C. M. P. No. 248 of 1918. 18th March, 1918.

1. (1912) 23 M. L. J. 677.
2. (1907) I. L. R. 34 C. 1037.
3. (1914) 20 C. L. J. 512.

Lakshmanan Chetty v. Palaniappa Chetty.

*K. V. Krishnaswami Aiyar* for the Petitioners.

*K. Bhashyam Iyengar* for the Respondents.

The court made the following

**Order** :—As regards the preliminary objection that no petition under Or. 41, rule 5 of the Code of Civil Procedure lies in this court, in respect of stay of sale of immoveable property, Wallis, C. J. and Hannay, J. doubted in C. M. P. No. 1595* of 1914 (in A. A. O. No. 173 of 1914) the soundness of the decision in *Kanniappan Chetty* v. *Manikkavasagam Chetty* [1] which was quoted in support of the objection. We are inclined to go further and dissent (with great respect) from the decision in *Kanniappan Chetty* v. *Manikkavasagam Chetty* [1]. The inherent powers of the Appellate Court clearly recognised by O. 41 R. 5 cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing court by O. 41 R. 6, which rule seems to have been clearly intended in order that the executing court might be compelled to exercise it in emergent cases for benefit of the judgment debtor. (See also the pertinent observations of Mookerjee, J. in *Tribeni Sahu* v. *Bhagwat Bux* [2] and *Rama Prasad* v. *Anukul Chandra* [3]). We overrule the preliminary objection.

On the merits it is not the decree under appeal that is sought to be executed by the sale of immoveable property but another decree against the execution of which the decree under appeal refused to grant an injunction. The present petition is not for a temporary injunction but it is for stay of execution of the decree under appeal. The decree appealed against not being under execution, O. 41, R. 5 does not apply, and this petition is misconceived. It is therefore dismissed with costs.

C. A. S.

C. M. P. No. 1595 of 1914.

* **Order** :—Objection has been taken on the part of the decree-holders, to whom a notice was directed to go in this case, that the present application to stay the sale in execution of this court's decree is not competent on the ground that under O. XLI R. 6 (2) such an application ought to be made to the court which made the order for sale. That view of the rule has been taken by this court in *Kanniappan Chetty* v. *Manikkavasagam Chetty*, [1] and by the Allahabad High Court in *Sayid Ameer Ali* v. *Babuk Pershad*, [4] though the point is not discussed in the latter case. Mr. Venkatarama Sastri has argued that the decision in 23 M.L.J. 677, should not be followed; and that there is nothing in the provisions of R. 6, sub-rule 2 to cut down the general jurisdiction of the appellate court which is recognised in Rule 5. We feel that there is considerable force in this argument; but

1. (1912) 23 M. L. J. 677.
2. (1907) I. L. R. 34 C. 1037.
3. (1914) 20 C. L. J. 512.
4. (1910) 11 I. C. 22.

Lakshmanan Chetty v. Palaniappa Chetty.

at the same time it seems to us that, even assuming that the appellate court's jurisdiction has not been taken away, yet where the legislature has pointed out the lower court as the court to whom the application should be made, a very strong case ought to be made out for the interference of the appellate court in a matter of this kind ; and we do not think such a case has been made out here.

The second objection appears to be even more fatal. It is, that the sale had actually been concluded by acceptance of the bid at the time that the *interim* stay was ordered by this court. The interim order of this court appears, by the court record, to have been made at 11-24 A. M. and the affidavit put in by the petitioner as to the acceptance of the bid on the same date by the lower court certainly does not show that it was made subsequently to the interim order issued by this Court But, on the contrary it leads to the conclusion that it was made earlier. Mr. Venkatarama Sastri has then sought to rely upon a rule which is recognised in England that a Judicial order is held by fiction to have been made "at the earliest hour of the day on which it was made". He has not cited any authority showing that that fiction has been recognised and applied in India, or that it ought to be applied by us as a principle of 'justice, equity and good conscience'. In the absence of authority we are not prepared to apply it to the circumstances of the present case. It is admitted that if the bid had been accepted by the lower court before the interim stay by this court was made it would not be competent for us to interfere. Lastly, we think it right to say that, even upon the merits, we are not satisfied that any case for interference has been made out. This decree is a very old one and there has been abundance of time for the judgment debtor to raise money to satisfy it if he could. The sale itself was continued over a long period. It was originally for one week and continued by consent for another week. On the last day an application was made for stay on the ground that some one has been found who would be prepared to pay a larger price than had been bidden if the sale was adjourned for three months. The sum in question is a very large one, five lakhs, and this gentleman occupies the position of Personal Asst to the General Traffic Manager of the S. I. Ry. Co. Ltd. and, therefore, is not a person who would ordinarily be in a position to command 5 lakhs and if he could, there was nothing to prevent him from bidding up to that amount. I commented on this aspect of the case when the application for an interim stay was made, but the further affidavit which has since been filed is studiously silent as to the capacity of this gentleman to find this amount even if the extention of time and stay of sale were allowed. All that is said is that he is willing to make a deposit which is to be subject to forfeiture in case of failure.

In these circumstances, we do not think that sufficient ground has been made out to induce the court to interfere and we dismiss the application with costs

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE BAKEWELL.

Sree Raja Manyam Mahälakshmamma Garu. ... *Petitioner* * *(Counter-Petitioner-Plaintiff).*

*v.*

Muchika Appalaraju ... *Respondent (Petitioner 1st Defendant).*

Manyam Mahalakshmamma Garu *v* Muchika Appalaraju.

*Godaveri Agency Rules, Rr. 10 and 16—Order by Agency Munsif in execution of a decree of the Government Agent's court—Appeal.*

The Government agent acting under Rule 10 of the Godaveri Agency Rules employed a Munsif to execute a decree of the Agent's court. The Agency Munsif made an order in the course of the execution proceedings against which the decree-holder filed an appeal in the usual form of a petition to the Government, under rule 16 of the Agency Rules.

*Held*, that the order of the Agency Munsif was not a decree, the provisions of the Civil Procedure Code not being applicable to the case, and therefore no appeal lay against the order.

The order of the Agency Munsif could not, in law, be said to be a proceeding of the Government Agent so as to attract the operation of Rule 16 of the Agency Rules. The proceedings of a subordinate officer of a court of justice do not become the proceedings of the court itself unless the statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the court and adopted or approved of by him.

*Maharaja of Jeypore* v *Nila Devi Pata Mahadevi Garu* [1], distinguished.

The desirability of a revision of the Agency Rules, pointed out.

Petition under R. XVI of the Godaveri Agency Rules referred to the High Court by the Government of Madras in its proceedings, G. O. No. 3023, Home (Judicial) dated 16th December 1916, preferred against the Order of the Court of the Agency District Munsif of Polavaram dated 4th October 1916 in C. M. P. No. 6 of 1915 in E. P. No. 93 of 1910 in E. P. No. 65 of 1903 (O. S. No. 1 of 1897 on the file of the Court of the Government Agent, Godavery.)

*T. R. Ramachandra Aiyar* for Petitioner.

*V. Ramesam* for Respondent.

The Court made the following

Sadasiva Aiyar, J.

**Order**:—*Sadasiva Aiyar, J.*:—This is a petition to the Government under R. XVI of the Godavery Agency Rules, which has been preferred to the High Court for disposal. The petition prays to set aside the order of the Agency Munsif of Polavaram

* C. M. P. No. 3782 of 1916. 18th November, 1917.

1. (1902) I. L. R. 27 M. 109=13 M. L. J. 151.

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dated 4-10-1916 passed in Execution Petition No. 93 of 1910 on his file.

The appellant was the decree-holder on O. S. No. 1 of 1897 on the file of the Government Agent's Court, the decree of the High Court in Appeal in that suit being dated January 1902.

As regards execution of decrees of the Agency Courts, the relevant rules are as follows:—Rule 10 (1) "With the exception of the Court of the Government Agent, who shall be at liberty, in the execution of decrees, *to employ an Assistant or Munsif*; all decrees of other Courts within his jurisdiction shall be carried into effect by the Court by which the suit may have been decided." "If the person against whom, or the property against which, it is sought to execute any decree resides, or is situated within the jurisdiction of a Court of the same Agency other than the Court issuing the decree, such decree shall be executed in the manner provided in Rule 14, clause (2), R" (that is, by forwarding the process in execution to the Court of the Divisional Assistant within whose jurisdiction the person or property resides or lies who shall *ordinarily* cause the same to be executed). Cl. (2): "decrees shall be executed by an order addressed to the proper officer of the Court; ***." In the present case, the Government Agent seems to have *employed* the Polavaram Agency Munsif to execute the Agency Court's decree of 1902. That decree awarded to the plaintiff possession of the forest lands of Singanapalli. To give such possession in execution, the boundary lines between the Singanapalli forest and Chengondapalli forest had to be demarcated. On the 18th July, 1904 the Agency Munsif determined by description on paper the boundary lines as follows: (*a*) East by a line drawn from Maredukoyya Dimma to the summit of Racha Kodutula Konda and (*b*) thence midway between the plateau on the top of the said hill and of Darakonda to the centre of Yerrakonda (*c*) summit shall rest in Singanapatti. Then in 1910, the plaintiff applied by E. P. 93 of 1910 for the cutting of the boundary line as above fixed in the order of July 1904. The Munsif appointed a Commissioner to cut the boundary line and he cut the boundary line according to the best of his ability and according to the three directions (*a*), (*b*) and (*c*) above given in the Munsif's order. While the Commissioner was thus cutting the boundary line, the defendant presented C. M. P. No. 6 of 1915 against the Commissioner's proceedings to

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the Agency Munsif, his principal objections to the Commissioner's doings being that Yerrakonda and Darakonda referred to in direction (*b*) in the Order of 1904 were not the hills which the Commissioner thought to be of those respective names but that they were two other hills and that the Commissioner should be directed to draw the boundary line between the tops of the two correct hills and not of the wrong hills. The Munsif practically accepted the defendant's (judgment-debtor's) contention and passed an order accordingly. It is against that order, that the present appeal in the usual form of a petition to the Government under rule 16 has been filed.

It is clear that if this order of the Agency *Munsif* in execution of the *Government Agent's* decree is the judicial order of the Agency Munsif's Court itself in execution, no appeal is provided against it under the Godavery Agency Rules. Those Rules are published in the Madras Code, Vol. II, 1915, pages 1258 to 1263 and it is only against the *decrees in original suits* (see R. 4) that appeals lie from the Munsif to the Assistant Agent, a second appeal from the Assistant Agent to the Agent and a third appeal from the Agent by petition to the Government (which means practically to the High Court) under Rule 16. The Civil Procedure Code not applying, orders passed in execution are not *decrees*. (See *Sri Sri Sri Vikrama Deo Maharajulum Garu* v. *Sri Nela Devi Pattamaha Devi Garu* [1]. Hence no appeal lay even to the Assistant Agent from the order in dispute and much less of course a third appeal to this court. (See C. M. P. No. 513 of 1911 decided by Sundara Aiyar, J. and myself.)

Mr. T. R. Ramachandra Iyer who appeared for the petitioner-decree-holder, (who might be called the appellant) was therefore obliged to argue that though the order purports to be one passed by the Agency Munsif, it is, in the eye of the law an order of the Government Agent himself and hence Rule 16 which allows a petition against *all proceedings* of the Government Agent (including proceedings in execution) to the Government applies in this case. The sole question therefore is whether the order of the Agency Munsif under appeal is in the eye of the law a proceeding of the Government Agent himself. Mr. Ramachandra Iyer's arguments, if I followed him aright, were formulated in two ways (1) an Agency Munsif employed by the Government Agent under Rule 10 to

1. (1902) I. L. R. 26 Mad. 266

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execute the decree of the Government Agent's Court becomes himself the Government Agent or the Government Agent's Deputy by delegated authority and his order became a proceeding of the Government Agent himself; (2) Even if the Munsif's Court did not become the Government Agent's Court, the Munsif became an officer of the Government Agent's Court and his proceedings as an officer of the Government Agent's Court became the proceedings of the Government Agent himself. On the first branch of the argument, he cited Broom's Legal Maxims, page 655: "It may, likewise, be well to observe, that delegated jurisdiction, as distinguished from proper jurisdiction, is that which is communicated by a judge to some other person, who acts in his name, and is called a deputy; and this jurisdiction is, in law, held to be that of the judge who appoints the deputy, and not of the deputy; and in this case the maxim holds, *delegatus non potest delegare*." "Nor can an individual clothed with judicial functions delegate the discharge of those functions to another, unless as in the case of a County Court Judge, he be expressly empowered to do so. 51 and 52 Vict. Ch. 43 S. 18 to 21." 51 and 52 Vict Ch. 43, S. 18 to 21 allow a County Court Judge to appoint a Barrister of not less than 7 years' standing to act for him as his deputy when he is temporarily incapacitated through illness etc. It is clear that such a deputy is the only judge of the County Court during the period of his deputation and his employment does not create another judicial office. Now the employment of the Agency Munsif by the Government Agent to execute a decree of the latter's court under R. 10 cannot make the Agency Munsif the incumbent of the Judicial office of the Government Agent himself. The Government Agent continues to preside in his own court and the Agency Munsif is only an employee under the Government Agent in the matter of the execution of that particular decree. I at first thought when considering these obscure and unsatisfactory Agency Rules that R. 10 probably meant that the Government Agent might transfer the execution from his own court to that of the Agency Munsif. But seeing that R. 10 cl. 1 does not provide even for the transfer of a decree for execution from one court under the Government Agent to another court even under the same Agent but only for execution of *processes* sent by one such court to another and that the word 'transfer' seems to have been scrupulously avoided, I think, after the best consideration that I have been able to give to the subject that the Munsif or the

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Assistant Agent employed by the Government Agent to execute the latter's decree does not thereby acquire independent judicial powers over the execution proceedings and that he does not become the Government Agent's Court by and in being so employed, and is only in the same position as a Commissioner or an Amin or a Ministerial Officer employed by an ordinary court to assist it in particular judicial proceedings. The analogy of a delegation by a County Court Judge to a Barrister who is the sole County Court Judge for the time being cannot therefore be invoked so as to make the proceedings of the Agency Munsif the proceedings of the Government Agent himself.

As regards the second branch of the argument, the proceedings of a Subordinate Officer of a court of justice do not become the proceedings of the court itself unless the statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the court and adopted or approved of by him. Mr. Ramachandra Iyer referred us to the decision in *Maharajah of Jeypore* v. *Nila Devi Patta Mahadevi Garu*[1] as supporting his contention. That case arose out of a petition under R. 31 of the Vizagapatam Agency Rules corresponding to Rule 16 of the Godaveri Agency Rules and there is some obscurity in the statement of facts in the report of that case. The order in execution in that case is said in the report (preceding the judgment) to have been passed by the acting senior Assistant Agent and to have been confirmed by the Agent on appeal *against which appellate judgment* the petition is said to have been presented *under Rule 20* which relates however to appeals against *decrees.* This report seems to be a mistake because orders in execution are not decrees. In the body of the judgment, however, Rule 31 is referred to and that is also the rule mentioned in the report of the same case as found in 13 M. L. J. 151. Hence we must take it that the appeal in that case was against an order in execution passed by the Government Agent himself and not against an order in appeal from a senior Assistant Agent. This is also confirmed by the following sentence at page 111 of the report: "It was further urged that the order was not that of the Agent but of his Assistant, and so Rule 31 was inapplicable, but we find that the order was passed *under the authority of the Agent*

1. (1902) I. L. R. 27 Mad. 109.

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as is expressly stated therein." Thus the order in that case was the order of the Agent himself though signed by the Assistant Agent under the express authority of the Government Agent. That is, the Government Agent applied his judicial mind to the matter, passed an order and asked the Assistant Agent to sign the order for him (the Agent). Hence the High Court held in that case that Rule 31 corresponding to Godavery Rule 16 applied and an appeal by way of petition lay. Similarly in C. M. P. No. 532 of 1911, Sir Sankaran Nair and Sir William Ayling, JJ. treated that petition as an appeal against the order of the Agent directing the Special Assistant Agent to dismiss certain petitions as barred by limitation while conceding that against an order of the Special Assistant Agent himself, no appeal lay. In the present case, the order of the Agency Munsif was not passed with the knowledge or signed under the "authority" of the Government Agent. The Government Agent did not pass the order himself and did not give authority to the Agency Munsif to sign the order for him. I do not therefore think that the decision in *Maharajah of Jeypore* v. *Sri Nila Devi Patta Mahadevi* [1], applies to this case.

In the result, I would uphold the preliminary objection put forward by Mr. Ramesam that Rule 16 cannot be invoked in this case as there was no order by the Government Agent himself. I think that where the Government Agent employs the Munsif to execute the Government Agent's decree, the Agent retains full control over the proceedings which are being conducted by the Agency Munsif as the Government Agent's employee and that the appellant's proper course was to have made representations to the Agent against the proceedings of the Munsif and if the Agent passes proceedings on such representations against the appellant, to apply afterwards by petition under Rule XVI. I would therefore dismiss the present petition with costs.

I wish to state in conclusion that it seems to be high time that these unsatisfactory Agency Rules are revised by a proper draftsman. In *Rajendra Singh* v. *Maharajah of Jeypore* [2], Seshagiri Iyer and Napier, JJ. state, "it is somewhat anomalous that the Agent should hear appeals from cases which he alone has power to entertain and which are beyond the pecuniary jurisdiction of the Divisional Assistants. The analogy of the Civil Courts

1. (1902) I. L. R. 27 M. 109. 2. (1915) 30 I. C. 76.

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Act in the Presidency is against such a procedure. But we have to interpret the rules as we find them however much we may consider that they should have been different." I find also that in 1863 itself, the rules relating to criminal justice had been cancelled in the Ganjam and Vizagapatam Agency and the Code of Criminal Procedure seems to be now in force in the Agency tracts. It is to be desired that though all the elaborate rule of the Civil Procedure Code may not be made at once applicable to the Agency tracts, the rules actually framed should follow the language of the corresponding sections of the Civil Procedure Code as far as possible, instead of using the loose expressions found in most of the existing rules.

Bakewell, J.

*Bakewell, J* :—I agree with the order proposed by my learned brother.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Komandur Srinivasa Seshacharlu and others. *Appellants** (*Plaintiffs*).

*v.*

Komandus Seshamma and others ... *Respondents* (*Defendants*).

Srinivasa Seshacharlu v. Seshamma.

*Will—Construction—Bequest by implication—The same rules apply in this country as in England—Bequest to the two daughters of testator in shares—Further provision that the male Santhathi (offspring) of one of the daughters should take like the offspring of the other daughter—No express gift to the latter—Latter take a bequest by implication.*

A testator died leaving behind him two daughters, the elder named Seshamma, who had no offspring at the testator's death and the younger named Andalammal who had offspring and by the terms of his will provided as follows "as out of my above said two daughters Andalammal has been attending to all my comforts and as her male *santhathi* are entitled to perform Karmams to me she should enjoy two-thirds—two of the three shares—and Seshamma should enjoy the third share." The testator further provided that "my daughters should enjoy the said land in the proportion of the above three shares" and further provided "if a male issue is hereafter born to my daughter, that is, Seshamma, that grandson *should like the santhathi of my younger daughter* enjoy her third share having powers of gift and sale from son to grandson and so on from generation to generation" and there were no means of express bequest to Andalammal's children.

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* A. S. No. 321 of 1916. 2nd November, 1917.

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*Held*, on a construction of the will, the offspring of Andalammal, though there is no express bequest of properties to them, took an estate by implication.

The rules as to bequests by implication are the same in this country as in England.

*Towns* v. *Wentworth* [1], *Sweeting* v. *Prideaun* [2], *Key* v. *Key* [3], *In re Redfern* : *Redfern* v. *Bryning* [4], *Ellocasee Dasee* v. *Durpunarain* [5], *Chedilal* v. *Gobind Ram* [6], *Seshamma* v. *Narasamma* [7] followed.

Appeal against the Decree of the District Court of Nellore in Original Suit No. 43 of 1914.

The following is the translation of the will under consideration by their Lordships in this case.

The will caused to be written (executed) on 5th January 1910 by Sriranga Parthasaradhy Iyengar, son of Nelatur Narasimha Charyulu Varu (living by) landed property, Brahmin, and at present residing at Ranganayokulupeta, hamlet of Nellore.

I am now 67 years old. My wife and the son born to me are dead. Two daughters alone, viz., Seshamma, wife of Komandur Nellimitta Venkata Charyulu, and Andalamma, wife of Komandur Varada Charyulu are alive as my heirs. Of these (two daughters), Seshamma has no male issue, and Andalamma alone has male Santhathi (offspring). As I am an old man and as I fear that I shall not live for a long time, I, while possessing (good) understanding, am writing in this (will) how all my property moveable and immoveable should be utilized after my death. Therefore, in this manner effect should be given.

I sold to Allur Varadareddi, a resident of Gangavaram shotriem (the following properties). * * * * *

Therefore, the remaining half should be divided from the said Varadareddi and as out of my abovesaid two daughters Andalammal has been attending to all my comforts and as her male santhathi (offspring) are entitled to (perform) karmams to me she should enjoy $\frac{2}{3}$—two out of three shares—and Seshamma should enjoy the third ($\frac{1}{3}$) share. But as I gifted away to my sister's son, Thirupathy Venkatacharyulu and put him in possession of my half, viz., a. 1—43 cts. in a. 2—36 cts. in Gangavaram cheruvu, his family shall enjoy the said land from son to grandson and so on from generation to generation. My daughters should divide and enjoy in three shares in the abovesaid manner about 60 ankanams of site—situate in Gangavaram shrotriem and bounded on East and South by street and on the West and North by the compound wall of my site—15 ankanams (of) tiled house therein with stone walls and a well of *bontha* stone, and in the same village the entire site of

1. (1858) 11 Moo. P. C. p. 526.
2. (1876) 2 Ch. D. p. 413.
3. (1853) 4 De. M. & G. p. 84.
4. (1877) 6 Ch. D. p. 133.
5. (1878) I. L. R. 5 Cal. 59 at p. 63.
6. (1902) I. L. R. 30 All. p. 458.
7. (1899) I. L. R. 22 Mad. 35.

old houses situate on *peta poti*. Further, a. 4—16 cents which comes to the 1/5 share which I now have in a. 20—79 cents (comprised) Nos 114—115 in Gangavaram should be kept in *anamath* (should be set apart) and it is only the remaining lands that my daughters should divide in the above manner. Out of these a. 4—16 cts. a. 3—12 cts. of land should be enjoyed till her life-time by my sister-in-law (wife's elder sister) Bandipalle Seshamma who has for a long time been attending to my comforts and she may remain wherever she likes. After her death my daughters should enjoy this land in the proportion of the above three shares. The remaining a. 1—4 cts. should in my obsequies be given away as gift for Sri Vedantha Desika Swamivaru gracing Ranganayakulupeta, Nellore. The Vicharnakarthalu (managers) of the temple should take possession of this land and should with the income derived therefrom be performing one *vutsavam* of the annual *vutsavams* of Sri Vedantha Desika Swamivaru which I am now performing. Those who enjoy the said a. 4—16 cts. in the above manner should enjoy (the same) paying cist to the sircar at Rs. 2-4-0 per acre. In enjoying in the above manner—as my elder daughter, Seshamma, has no male issue, (she) should be enjoying the third share that comes to her without contracting debts and after her death the (said third share, should go to my 2nd daughter, Andalammal, (and) so her santhathi (offspring). But if she adopts a son this property should not go to the adopted son. If a male issue is hereafter born to my elder daughter, that grandson should like santhathi "ఆ చిన్న కొమార్తె సంతతి వలదనె" (offspring of my younger daughter enjoy her (elder daughter's) third share having powers of gift and sale from son to grandson and so on from generation to generation to question. My daughters shall enjoy the cattle which I have in the above three shares according to what mediators say. Narasimhacharyulu, son of Nelatoor Seshacharyulu mortgaged lands in Gandavaram and borrowed from me Rs. 300. In Ongole Nelatoor Venkata Narasimhacharyulu the husband of my wife's sister borrowed from me Rs. 100 and in that matter he owes (to me) up to date Rs. 50 (fifty rupees). If these debts are paid, then with them, or, if not paid, borrowing this amount, my daughter shall cause my obsequies and *masikams* up to the first annual ceremony to be performed properly. In these obsequies gift of two cows and the previously mentioned gift of land should be made. The younger daughter alone shall have the right of collecting the said debts and of causing the said *karmams* (obsequies) to be performed. I am indebted to a small extent in respect of interest to Battepati Kamakshamma in Gangavaram. Therefore my younger daughter alone shall discharge that debt. There are no utensils whatever for partition. Therefore no disputes should be made in this matter. All the provisions

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mentioned herein should be carried into effect after my death. This is the will which I while possessing good understanding and of my own accord caused to be written at Ranganayakulupeta, Nellore, by Narasimhacharyulu, son of Nelatoor Krishnamacharyulu.

*A. Krishnaswami Aiyar* (with him *K. Bhashyam and K. Krishnaswami Aiyangar*) for Appellants.

*K. V. Krishnaswami Aiyar* for *S. Varadachariar* for Respondents.

The Court delivered the following

**Judgment**:—The point involved in this appeal relates to the construction of a will executed by a Hindu. The document is marked as Exhibit A in the case. The construction of the document is by no means free from difficulty. But once the rules of construction applicable to such cases are borne in mind, we think that we have enough in this will from which we can gather the intention of the testator in the events that have happened. He had two daughters, one called Seshamma and the other Andalammal the younger daughter. Seshamma had no child, but Andalammal had two sons. The question we have to consider is whether there was any gift to Andalammal's children or whether the gift was to Andalammal of an absolute estate or of a daughter's estate according to the Hindu Law.

The will starts with saying that the property should be divided into three shares, one share should be given to Seshamma and the other two to Andalammal, it having been already recited that the testator's two daughters were alive as his heirs and that, of these daughters, Andalammal had male offspring. The testator says " Therefore, the remaining half should be divided from the said Varada Reddi and as out of my above said two daughters, Andalammal has been attending to all my comforts and as her male santhathi (translated as offspring) are entitled to perform Karmams to me, she should enjoy two-third—two of the three shares and Seshamma should enjoy the third share." Then the testator provides that his daughters should divide and enjoy in three shares in the above said manner above 60 Ankanams of site. " After her death (meaning the death of his sister-in-law, B. Seshamma in whose favour he was making the bequest,) " my daughters should enjoy the said land in the proportion of the above three shares. " Now we come to the more important clause in the will. " In enjoying in the above manner as my elder daughter Seshamma has no male issue, she should be enjoying the third share

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that comes to her without contracting debts and after her death, the said third share should go to my second daughter Andalammal and to her Santhathi, offspring. But if she adopts a son, this property should not go to the adopted son. If a male issue is hereafter born to my daughter, that is, Seshamma, that grandson should like the Santhathi (offspring) of my younger daughter, enjoy her (elder daughter's) third share having power of gift and sale from son to grandson and so on from generation to generation." There is only one other sentence to which reference need be made where the testator provides that the younger daughter alone shall have the right of collecting the said debts and of causing the said Karmams or obsequies to be performed.

The learned District Judge has held that though it was the intention of the testator to make a gift to the children of Andalammal, he omitted to do so and therefore the court cannot carry out what might have been the intention of the testator but which he failed to carry out in the will. If the District Judge is right in his reading of the will, no doubt the decree passed by him would be correct. It may at once be said that there is no gift to the children in express and clear terms. The learned pleader for the appellant Mr. A. Krishnaswamy Iyer however argues that taking the whole will into consideration, three things are clear:—(1) that it was the intention of the testator to make a gift to the children of Andalammal, (2) that that intention can be gathered as a matter of construction especially from the words "should like the santhathi of my younger daughter, enjoy her third share having powers of gift and sale from son to grandson and so on from generation to generation" and (3) at any rate that this is a case of an implied grant. Nothing can be clear from the reading of the will than that the testator was extremely anxious that his property should go to his daughters and their natural children. This is to be gathered especially from the fact that in the contingency of Seshamma not bearing a son, the property should not go to any adopted son of hers. It is not suggested that he had any other relatives or kinsmen besides those mentioned in the will on whom he would like the property to devolve. He starts by saying that he is making provisions in respect of all his property moveable and immoveable. The District Judge however thinks that what the testator intended was to make a gift to his two daughters of estates corresponding to a Hindu daughter's

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estate and that he assumed that Andalammal who was the younger daughter would survive Seshammal and himself. That being so, the contingency that actually happened, namely the death of Andalammal before the death of the testator was not within his contemplation and he failed to provide for it. All this depends upon what construction is to be placed upon the will. The learned District Judge does not take all the provisions together in order to arrive at the mind of the testator. He first of all takes into consideration the words in the earlier part of the will, that is to say, where the testator mentions the disposition into shares—1/3 in favour of Seshamma and 2/3 in favour of Andalammal, and infers that they are given estates such as a Hindu daughter would take by inheritance under the general Hindu Law. Proceeding upon that basis he construes the other clauses of the will and that is exactly the nature of the argument which has been addressed to us by the learned Vakil for the respondents. Now take the case of Seshamma. The testator in the earlier part of the will contents himself merely with saying that she is to take 1/3 of the properties, but he goes on afterwards to lay down what is to happen in case Seshamma should die without issue and in case she was to have an issue or she was to adopt a son. All these provisions clearly indicate that so far as Seshamma was concerned, she was intended to take only a life estate and if she left no issue, her share was to go over to Andalammal and to her children. If she were to have male issue, the son or sons were to take directly under the will on the death of Seshamma. If that was the testator's intention with regard to Seshamma's male issue, it seems to us to be quite clear that similar was his intention with respect to Andalamma's sons. He gives 2/3 to Andalammal as her sons are entitled to perform his karmams. The scheme of the will was not to give anything less to Andalammal and her children than what was given to Seshamma and her sons but to treat the former on the same footing as the latter. Then we have this clause:—"If a male issue is hereafter born to my elder daughter, the grandson should like the santhathi of my younger daughter enjoy her third share..............................." "Should like the santhathi of my younger daughter" can have no other meaning than that it was the intention of the testator that they should take the property given to Andalammal after her death. No doubt this is a case of inartistic careless drafting, but we do not see what other meaning can be given to these words than

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what we have stated. The learned pleader for the respondents suggests to us that by these words all that the testator meant to convey was that he expected that his younger daughter's children would, in the ordinary course of Hindu Law, enjoy the property which he was giving to that daughter. But that is not a possible construction having regard to the fact that the gift over after the life estate of Seshamma is to her male issue and so it can hardly be contended that in her case the testator did not dispose of the reversion. The reversion in both the cases was intended to be placed on the same footing, that is to say, in the case of each daughter; it is to go to her children. Numerous cases have been cited to us, but so far as the construction of this document is concerned, little help is to be derived from the provisions of other wills. But there are certain general rules of construction which are applicable to this case. They are clearly laid down in the well-known judgment of Lord Kinsgdown in *Towns* v. *Wentworth* [1], extracts from which have been quoted in more than one case as laying down the proper rules for the construction of wills like this which do not contain express words of gift but where the gift is to be implied no doubt from the language used, but having regard to the dominating intention of the testator to be ascertained from the entire scheme of the will. In *Sweeting* v. *Prideaux* [2] Hall, V. C. upheld a gift which could only be implied from the general tenor of the entire will. He cites with approval the proposition laid down by Lord Justice Knight Bruce, in the case of *Key* v. *Key* [3] in these words :—"In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly. Then he quotes the passage above alluded to from Lord Kingsdown's judgment "........................and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in

1. (1858) 11 Moore's P. C. 526. 2. (1876) L. R. 2 Ch. D. 413.
3. (1853) 4 D. M. & G. 73, 84.

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the will expressly to devise, the court is to supply the defect by implication; and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared." These rules of construction relating to wills have not, so far as we are aware, ever been doubted either in England or here. It will not serve any useful purpose to go through the different cases to see how far the courts have gone to effectuate the intention of the testator, in particular cases provided that intention is to be gathered from the entire will although the gift is expressed in defective or elliptical form of language. But one of the strongest cases seems to us to be *In re Redfern*: *Redfern* v. *Bryning* [1]. There Bacon, V. C. relied mainly on the scheme of the will as showing that the testator intended to make an equal division of all his estate among his children and though there was an omission with respect to one of the children, he felt himself justified in supplying that omission, being clear as to the intention of the testator. He says "I think upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will." On behalf of the respondent we have been referred to the case of *Scale* v. *Rawlins* [2]. But all that is laid down there is that the court is not at liberty to speculate upon the intention of the testator if there is no language in the will by which that intention is expressed. It does not in any way throw doubt upon the other rule to which we have referred.

Mr. K. V. Krishnaswami Aiyar has asked us to say that the general principles of construction such as we have mentioned are not applicable to Hindu wills. The argument is that under the Hindu Law or under the rules of construction of Hindu wills, a presumption against partial intestacy has no room and therefore the English law has gone much further than we should be justified in going towards carrying out the intention of the testator. But we do not find that this is borne out by authority. On the other hand there are a number of cases which have laid down that the rule in question applies to Hindu wills as well. (*Ellokassee Dossee* v. *Durponarain Bysack* [3], *Cheda Lal* v. *Gobind Ram* [4] and *Seshamma* v. *Narasamma* [5]. The

1. (1877) 6 Ch D. 133.
2. (1892) A. C. 342.
3. (1879) I. L. R. 5 C. 59 at p. 63.
4. (1902) I. L. R. 30 A 455, 458.
5. (1899) I. L. R. 22 M. 357.

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learned pleader for the respondents also enunciated a proposition that in cases of bequest to a Hindu daughter she takes an absolute estate. There again he is unsupported by any authority. On the other hand, the decided cases and certainly the later decisions lay down the contrary proposition. No doubt there are some recent decisions which say that there is no presumption that the gift to a Hindu daughter is only of a life estate or of an estate which the daughter takes under the Hindu Law of intestate succession. But there is no authority for saying that there is any positive presumption that such a gift is of an absolute estate. We may also mention that it was attempted to be argued that the mention of the 'offspring' of Andalammal was only by way of limitation indicative of a gift of inheritance. But that does not seem to us to be the proper construction having regard to the entire scheme of the will. By *santhathi*, the testator apparently meant her children or perhaps her sons because in the will sometimes the word santhathi is used by itself and sometimes the phrase the *male santhathi* is used. No such question was raised at the trial and there can be no doubt that what the testator meant was the children of Andalammal as the direct objects of bequest.

We allow the appeal and reverse the judgment of the District Judge. There will be a declaration that the plaintiffs are entitled to 2/3rd of the properties claimed in the plaint and Seshammal to 1/3rd for her life. There will be a preliminary decree for partition and there will be an enquiry into the mesne profits to which the plaintiffs are entitled as claimed in the plaint. The appellants are entitled to their costs from the respondents here and in the court below. Out of the costs payable by the respondents, the court fees payable by the appellants will be realised.

C. A. S.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

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| Chelikani Venkatarayanim Garu and others. | *Appellants* * *(Defendants Nos. 3, 8 and 12.)* |
| *v.* | |
| Sri Rajah Vatsavaya Venkata Subhadrayamma Jagapathi Bahadur Garu, senior widow and L. R. of 1st plaintiff and others. | *Respondents (2nd Plaintiff and Defendant and 25th Defendant.)* |

**Venkatarayanim Garu v. Vatsavaya Venkata Subhadrayamma.**

*Mortgage—Transfer of Property Act, S. 84—Usufructuary mortgage—Mortgagor asking the mortgagee for an account of what is due under the mortgage with an expression of willingness to pay—Mortgagee setting up absolute title in himself—Whether interest on the mortgage ceases to run from that date—Dispensing with tender—Proposal to make a tender—Money should be ready for payment—Rule 41 of the rules framed under Legal Practitioners Act—Special importance by reason of the large amount involved—Two vakils' fees.*

Where a mortgagor wrote to the usufructuary mortgagee asking the mortgagee to give him an account of what is due on the mortgage and expressed his willingness to pay what is due to the mortgagee, but the mortgagee stated that under the terms of the deed of mortgage he had acquired an absolute right to the property and therefore he was not bound to render any account and refused to do so and at the same time he mentioned the balance of amount due and it is found that the mortgagor had not then the money with him to pay the amount due, the interest on the mortgage would not cease to run from the date of the mortgagee's reply.

Their Lordships allowed fees for two vakils under the new rule 41 framed under the Legal Practitioners Act on the ground that the case was of special importance having regard to the amount involved, namely about 7 lakhs of Rupees, though there was no specially difficult question involved in the appeal and the vakil for the respondent was not even called upon to reply.

*Per Abdur Rahim, J*:—The question whether interest on a mortgage debt ceases from the date of tender or deposit depends upon the provisions of the Transfer of Property Act. That Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that even if a valid tender has not been made interest will cease to run if the mortgagee happens to set up a right to the property in himself.

*Per Oldfield, J.*:—The foundation of S. 84 of the Transfer of Property Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender inasmuch as the person who has made the tender not merely has to produce money in order to make it, but must also keep it ready for payment in court or otherwise. There is a distinction to be drawn between a proposal to make a tender and an actual tender and there is no reason why a person who makes the former should be treated any better than a person who makes the latter.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No. 30 of 1910, dated 25th December 1915.

* A. S. No. 209 of 1916. 21st November, 1917.

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*P. Narayanamurthi* and *M. Patanjah Sastri* for Appellant.

*K. Srinivasa Aiyangar* with him *D. Appa Rao, V. Ramesam, T. Ramachandra Rao, B. Somayya* and *M. Krishnam Raju* for Respondents.

The Court delivered the following

**Judgments**:—*Abdur Rahim, J*:—This appeal is in a suit to enforce a usufructuary mortgage and the question that is argued before us is, whether there was a valid tender of the amount due on the mortgage on 17th January 1899 or whether the respondents dispensed with the necessity for such a tender. On either ground the claim is that interest ceased to run from the date mentioned. Mr. Narayanamurthi who has argued the case for the appellants before us conceded and we think rightly, that what happened could not be stated to amount to a valid tender within the meaning of S. 84 of the Transfer of Property Act. The so-called tender really depends on what the second appellant wrote to the respondent on the date in question. That letter is Ex. Va and there he asked the mortgagee to give him an account of what is due to him and expressed his willingness to pay what is due to the mortgagee. In his reply the mortgagee stated that under the terms of Exihibit A, the deed of mortgage, he had acquired an absolute right to the property and therefore he was not bound to render any account to the appellants and refused to do so. He did however mention what was the amount that had become due on his mortgage. That amount was Rs. 3,19,946. It is argued that that would be the correct amount upon the terms of the mortgage, that is, calculating interest at the rates specified therein. This or any amount was never actually tendered by the appellants nor was it sought to be deposited in Court. In fact, before the institution of the suit, no deposit or tender was made, and even now after decree, no portion of the amount due to the respondents has been paid. The mere expression of willingness on the part of a debtor to pay a debt cannot possibly amount to a tender within the meaning of the law. In fact as we have said Mr. Narayanamurthi did not contend so far. But he has strongly urged upon us that inasmuch as the respondent put forward the allegation that he had acquired an absolute right to the property and therefore the appellants were not entitled to redeem him, it must be taken in law to amount to a dispensation of tender.

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On this point we have been referred to a number of Indian and English cases dealing with contracts for sale or other cases of reciprocal contracts: for instance, *Dayabhai Dipchand* v. *Dullabram Dayaram* [1], *The Owners of the Norway* v. *Ashburner* [2]. But the principle laid down in those cases is that where there are reciprocal promises and one of the promisees waives or dispenses with the performance of the promise made to him, he cannot afterwards put forward the non-performance of that promise as an answer to a suit for damages. But as regards the question whether the interest on a debt ceases from the date of tender or deposit, that class of cases depends upon the provisions of the Transfer of Property Act and upon a different principle. That Act lays down the conditions relating to a valid tender and valid deposit. It nowhere says that even if a valid tender has not been made, interest will cease to run if the mortgagee happens to set up a right to the property in himself. If the argument of the appellants were well founded, the position would be this. In every case where the mortgagee in good faith as in this case asserts that he has acquired an absolute right to the property, the mortgagor or the person who has purchased the equity of redemption by reason of that fact alone would be exempted from payment of interest provided he has expressed his willingness to pay the debt. No authority whatever has been cited in support of such a proposition which in our opinion, is altogether untenable. We have been referred to a Privy Council decision in *Harendra Pal Rai Chowdhri* v. *Maharani Dasi* [3]. There what happened was that under the contract between the parties the mortgagee *engaged* to appraise the mortgaged property if there was a proper negotiation for the sale of that property and it was brought to his notice. There was in fact a bona fide offer to purchase the property which was brought to the notice of the mortgagee in that case and he was asked to say whether he would appraise the property and fix the value. He refused to do so and in consequence the mortgagor was unable to find a purchaser for the property and repay the mortgage amount. Their Lordships held that the mortgagee having rendered impossible the sale of the property by the mortgagor by which the latter would have been in a position to repay the debt, the matter stood 'as if it was a

1. (1871) 8 Bom. H. C. R. (A. C. J.) 183.
2. (1865) 3 M. P. C. (N. S.) 245.
3. (1901) I. L. R. 28 C. 557.

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case of tender'. Mr. Narayanamurthi has attempted to build an argument upon this phrase to the effect that their Lordships treated the case as one of a tender. But we do not think that there is any warrant for such an interpretation. There was no case of tender there and the Judicial Committee merely cited the case of a tender only by way of analogy. The other case referred to *Gopeswar* v. *Jadab Chandra* [1] stood apparently on the same footing and none of those cases support the broad proposition which has been contended for before us on behalf of the appellants. We therefore hold that what happened between the appellants and the respondent in 1899 did not have in law the effect of making interest cease to run from that date. The Subordinate Judge also finds upon the evidence that in fact that 1st appellant had not the necessary amount at his disposal on the date of Exhibit V (*a*). He is no doubt a large landlord with an income of about Rs. 40,000 a year. But the evidence does not show that he had on the date in question the amount which would be required to discharge the mortgage debt at his disposal. He was obliged to borrow even small sums of money and sometime after 1899 he got considerably involved in debt. He swore in the witness box that he had Rs. 1,50,000 in his chest. The Subordinate Judge had disbelieved that evidence and we think rightly. If he had anything like that amount with him at the time, his account books would have been the best evidence to show it. He must have kept accounts which he has withheld from court and it was not the case of the 8th defendant, the principal appellant before us, that he had been negotiating to raise money still less that he had actually raised money in that way. We therefore accept the conclusion of the Subordinate Judge that if Ex. Va could be construed as an offer to pay it was not a bona fide offer in the sense that the appellants had the means of making the payment at the time. It may be pointed out that the 8th defendant bought the bulk of, the mortgaged properties for Rs. 2,40,000 while on 17th January 1899, the amount payable to the mortgagees was Rs. 3,00,000. That also supports the finding of the Subordinate Judge that the so-called offer in Ex. V (a) if offer it can be called at all was really not *bona fide*, for we are not prepared to hold that the 8th defendant was able and willing to pay that amount on the date in question.

1. (1915) 22 C. L. J. 352.

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The 3rd point which has been raised before us relates to costs. The Subordinate Judge has given a personal decree against defendants 3, 8 and 12 for the entire costs. As regards the conduct of the suit we think the Subordinate Judge was right in saying that the way in which the defence was conducted was vexatious. Defendants 3, 8 and 12 have been rightly made liable to pay the costs finally. But we do not think that they ought to be made personally liable for the costs relating to the stamp duty. So, that amount must be deducted from the amount of costs for which defendants 3, 8 and 12 have been made personally liable. In other respects, the decree of the Subordinate Judge is confirmed.

The 1st respondent's memorandum of objection relates to the expenses of the establishment charges, repairs to canals, &c., expenses for the village headman, service inams to village headman and village duties and other similar expenses. The Subordinate Judge has allowed Rs. 3000 a year for all these charges which are amounts actually spent by the mortgagee. But the contention is that Rs. 4000 is provided for in a lump sum in the deed of mortgage, that being the amount which was settled with the mortgagee as payable on account of these charges. The clause, in question says that it is agreed that after deducting for Government taxes so much and Rs. 4000 on account of establishment charges etc., and other payments mentioned therein the mortgagors should take an account of the balance of the net income from the mortgagee's officials on the first February of each year. The agreement is only to account for the balance and not with regard to any of the items mentioned in that clause. This view is suggested also by the clause at page 7 of the document which says that, if in addition to the usual earthwork which may have to be executed any extensive repairs have to be done in respect of river bunds etc., in respect of these unusual expenses, the mortgagee is entitled to charge the actual amount paid in excess of the Rs. 4000. There is no mention here as to the other items comprised in the Rs. 4000, that is to say, it is not provided that if for establishment charges, the mortgagee has actually spent more than what was taken into account, he would be entitled to the excess. Nor is it anywhere provided that if anything less than Rs. 4000 is spent the mortgagee must account for the rest. It seems to us that with respect to this petty and recurring items of expenditure which were of a variable character,

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both the parties agreed that they should be fixed at a certain figure. If all that they intended was that the actual expenses incurred under these heads should alone be allowed to the mortgagee there would have been no necessity to fix this figure at all. We must allow the memorandum of objections with costs to come out of the estate.

The 3rd respondent's memorandum of objections is not pressed and is dismissed.

Oldfield, J.

*Oldfield, J*:—I agree with my learned brother's judgment; but I prefer not to base my conclusion on any implication from the particular reason, which the 1st plaintiff gave in his letter Ex. V for refusing to receive money from the defendants. The foundation of S. 84 of the Transfer of Property Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person, who has made the tender not merely has to produce money in order to make it, but must also keep it ready for payment in court or otherwise. It is clear that no money could have been produced in this case and that none was kept ready for payment. There is no doubt a distinction to be drawn between a proposal to make a tender, such as we have in this case, and an actual tender; and there is no reason why a person, who makes the former should be treated any better than a person, who makes the latter. In these circumstances, it seems to me that the appellants who made no bona fide proposals and who, it is admitted, made no tender of any sort, cannot benefit by the principle of S. 84.

On the other points, I entirely agree with my learned brother's judgment.

This appeal again having been posted for orders this day, the court made the following

**Order**:—In this appeal Mr. K. Srinivasa Aiyangar appearing for the respondent has applied to us for fees for two vakils under the new R. 41 framed under the Legal Practitioner's Act. This rule empowers the court in cases of special difficulty or importance to allow two sets of fees to a party who has engaged more than one vakil. This case involved about 7 lakhs of rupees but it did not strike us that there was any specially difficult question involved in the appeal and in fact we did not call upon the learned vakil for the respondent to reply. It is however urged that the case was of special importance having

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regard to the amount involved. We are inclined to agree with that contention; for the respondent in view of the fact that no less than 7 lakhs were concerned in the litigation was justified in engaging two vakils. We therefore allow fees for two vakils which will be taxed according to the rules.

C. A. S.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.
## [FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Samanthala Koti Reddi ... *Appellant** (*1st Defendant*).

*v.*

Pothuri Subbiah and others ... *Respondents* (*Plaintiffs Nos. 1 and 3 and 2nd Plaintiff's legal representatives*).

F. B.

Samanthala Koti Reddi v. Pothuri Subbiah.

*Civil Procedure Code,* (*V of* 1908) *S.* 80—*Pulic Officer—Mala fide action in discharge of his duties—Notice under S.* 80 *whether essential before suit—"act purporting to be done in his official capacity", meaning of.*

Where a public officer in the discharge of his duties acts *mala fide*, he is entitled to notice before action under S. 80 of the Civil Procedure Code.

*Jogendra Nath Roy Bahadur* v. *Price* [1] approved. *Shahebzadee Shahunshah Begum* v. *Fergusson* [2] and *Muhammad Saddiq Ahamed* v. *Panna Lal* [3] dissented from.

*Per Chief Justice*: The expression "act purporting to be done in his official capacity" in S. 80 of the Civil Procedure Code means "an act intended to be done by him in his official capacity."

*Per Sadasiva Aiyar, J*:—An act done by a public officer would purport to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

*Per Spencer, J*:—The word "purporting" covers a profession by acts or by words or by appearance of what is true as well as of what is not true.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in Appeal Suit No. 13 of 1915 preferred against the decree of the Court of the District Munsif of Kanigiri in Original Suit No. 480 of 1912.

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* S. A. No 1601 of 1916 — 14th March, 1918.

1. (1897) I. L. R. 24 C. 584.
2. (1881) I. L. R. 7 C. 499.
3. (1903) I. L. R. 26 A. 220.

*T. V. Venkatarama Aiyar* and *R. Rajagopala Aiyar* for Appellant.

*P. Chenchiah* for *T. Prakasam* for Respondents.

*V. Ramesam* (*Acting Government Pleader*) amicus curiæ.

The Court (Seshagiri Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Seshagiri Aiyar, J.

*Seshagiri Aiyar, J*:—Plaintiffs had lent money on a mortgage to one Sankariah. Apprehending that this man was about to dispose off his property, they filed a suit in the District Munsif's Court and obtained an order for attachment of certain moveable properties belonging to him. In the meantime, a distraint upon the properties had been effected for arrears of revenue. The Village Munsif sold them and after remitting to the taluk treasury the amount recoverable from Sankariah, paid the balance over to him. This was after the attachment by the District Munsif. The plaintiffs sue the Village Munsif who is the first defendant in this suit for damages alleging that the 1st defendant colluded with Sankariah and paid the balance of the sale proceeds to him. The District Munsif was of opinion that the 1st defendant was not aware of the attachment by the Civil Court and dismissed the suit. The Subordinate Judge has found that the 1st defendant was aware of the attachment by the Civil Court and that he fraudulently paid over the balance of the sale proceeds to Sankariah. An attempt was made in this Court to question the correctness of this finding. But I see no reason for not accepting the conclusion of the Subordinate Judge.

The first additional issue in the case was whether the 1st defendant is entitled to notice as required by S. 80 of the Civil Procedure Code before action was brought. The Subordinate Judge has come to the conclusion that as the Village Munsif acted fraudulently S. 80 has no application.

It is not disputed that the action of the 1st defendant was within his powers as Village Munsif. The proclamation for the arrears, the sale of the property and the payment of the balance to the defaulter were all acts which as Village Munsif he was competent to do, but, on the finding of the Lower Appellate Court, there can be no doubt that, in performing these duties, the 1st defendant was acting with malice. The point for decision is whether in consequence of this want of *bona fides*, the 1st defendant has forfeited his right to notice before action. Although the

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case was very full argued on both sides, as we thought that this was a matter in which Government was interested, we requested Mr. Ramesam, the Government Pleader to assist us as *amicus curiæ* and we are very much indebted to him for his assistance.

S. 80 of the present code which corresponds to S. 424 of the old Code of Civil Procedure provides for notice in suits in respect of any act *purporting to be done* by a public officer in his official capacity. The language on the face of it does not import that unless the act is *bona fide*, the public officer will not be entitled to notice. There may be cases in which the public officer does acts which are not within his sphere of duties. In regard to them. he is not entitled to notice. But, when the acts are *intra vires* the language of the Code does not suggest that there must be also *bona fides*, if the protection afforded by S. 80 is to be availed of. But there are decisions which have held that the section is not applicable to persons who act maliciously. There are apparently two conflicting views regarding the meaning to be attached to the words "*purporting to act*." One set of authorities inclines to the view that where a public servant does the act knowingly and dishonestly for purposes which are not within the intent, although they may be within the letter of the powers he is clothed with, he cannot be said to be acting or purporting to act as a public servant. The other view puts a literal construction on the words. In that view, any one who performs his functions within the letter of the law, whatever may be his motives or ulterior intentions, must be regarded as having acted or purported to have acted as a public servant.

Now I shall examine the authorities. The earliest case in which the principle of *bona fides* was enunciated was in *Sahebzada Shahunsha Begum* v. *Fergusson* [1]. Cunningham, J., in that case says that a public officer is entitled to notice only in those cases in which some inadvertent act was committed by him in the discharge of his official duty. The learned Judge relies upon the English cases in support of this proposition. *Theobald* v. *Crichmore* [2] the first case relied on, was not a case in which any question of notice arose. The point considered by Lord Ellenborough, C. J., in that case was whether a constable forfeited his right to the shorter period of limitation because he acted illegally in the discharge of his duties. The learned Chief

1. (1881) I. L. R. 7 Cal. 499. 2 (1818) 1 B. and Ald .227.

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Justice points out referring to the Statute he was construing that it was only intended to protect persons acting illegally but with a *bona fide* intention of discharging their duty. The other case is *Attorney General* v. *Hackney Local Board* [1]. That was a case relating to injunction. The Vice Chancellor pointed out that in cases of injunction a notice was not necessary because the object of the suit will be frustrated if an injunction cannot at once be obtained against the contemplated misfeasance by the public authority. Then he says "The policy of the law is, that if these public bodies, entrusted with powers for public purposes, in the course of executing those powers shall happen to commit any inadvertence, irregularity or wrong, then before anybody has a right to require payment from them in respect of that wrong they shall have an opportunity of setting themselves right; they shall have the period of a month for the purpose of making amends, or for restoring if they have taken away anything, and for paying for, if they have done, any damage." It is on these two decisions that Mr. Justice Cunningham bases his conclusion that where any inadvertence or *bona fides* has not been proved the public officer is not entitled to any notice. This decision has been sought to be distinguished in *Jogendra Nath Roy Bahadur* v. *Price* [2], but I think the learned Judges in the latter case were not satisfied that the earlier decision was right. In *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* [3] Mr. Justice Woodroffe says that the section can apply only to defendants who are sued in an admitted official capacity, but not as individual trespassers. This view will have the effect of placing defendants whether they act honestly or dishonestly at the mercy of the plaintiff on the question of notice I may also refer to *Raghubans Sahai* v. *Phool Kumari* [4], which was relied on by Mr. Chenchia on behalf of the respondent. Mukherjee, J., therein points out that no notice need have been given to the Secretary of State as there was no relief claimed against him on the ground of fraud. Then he refers to *Sahebzadee Shahunsha Begum* v. *Fergusson* [5], and apparently agrees with the view taken by Cunningham, J., in that case. The observations were *obiter*. In *Peary Mohan Das* v. *D. Weston* [6], Fletcher, J., quotes *Sahebzadee Shahunsha Begum* v. *Fergusson* [5] and *Raghubans Sahai* v. *Phool Kumari* [4], and

1. (1875) L. R. 20 Eq. 626.
2. (1897) I. L. R. 24 C. 584.
3. (1908) I. L. R. 36 C. 28.
4. (1905) I. L. R. 32 C. 1130.
5. (1881) I. L. R. 7 C. 499
6. (1906) 16 C. W. N. 145.

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lays down the proposition that a public officer sued in respect of an act done in bad faith is not entitled to notice under S. 80. The matter was taken up in appeal in *Weston and Others* v. *Peary Mohan Das* [1]. The decision of Fletcher, J., was reversed; and I find nothing in that judgment on the question of notice.

In *Muhammad Saddiq Ahamad* v. *Panna Lal,* [2] Mr. Justice Banerjee apparently acted upon the principle stated in *Shahebzadee Shahunshah Begum* v. *Fergusson* [3]. The same learned Judge in *Baktwar Mall* v. *Abdul Latif* [4], distinguishes his earlier decision. In *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjt Singh* v. *Munuwar* [5], the acts charged against the Collector were certainly not done by him *bona fide*. Still the Full Bench in that case held that the Collector was entitled to notice when he wrongfully attached and sold property as agent to the Court of Wards. In *Bachcha Singh* v. *Jafar Beg,* [6] where a Police Inspector was the defendant and the complaint against him was that at the instigation of certain persons he illegally arrested the plaintiff and sent him for trial, Tudball, J., held that notice under S. 424 was necessary. The learned Judge does not examine the earlier cases upon the question of notice. But it is clear that this judgment cannot be reconciled with the judgment of Mr. Justice Banerji in *Muhammad Saddiq Ahamad* v. *Panna Lal* [2].

As regards Bombay. in *Ranchhod Varajbhai* v. *The Municipality of Dakor* [7], Sargeant, C.J., says that the object of the provision about notice would appear to be to give protection to Municipal bodies or other officers who in the *bona fide* discharge of public duties have committed illegal acts by their conduct. In *Cecil Gray* v. *The Cantonment Committee of Poona* [8], the learned Judges say that in all actions of tort the public officer is entitled to notice. In *Chhaganlal Kishoredas* v. *The Collector of Kaira* [9], Chandravarkar, J., says that the true test of an action for the purpose of S. 424 is "whether the wrong complained of as having been done by the public officer sued amounts, first to a distinct act on his part, and secondly, whether that act purported to have been done by him in his official capacity. Both these elements must

1 (1912) I. L. R. 40 C. 898.
2. (1903) I. L. R. 26 All. 220.
3. (1881) I. L. R. 7 Cal. 499
4. (1907) I. L. R. 29 All. 567.
5. (1880) I. L. R. 3 All. 20. (F. B.)
6 (1915) 13 A. L. J. 788.
7. (1884) I. L. R. 8 Bom. 421.
8. (1910) I. L. R. 34 Bom. 583.
9. (1910) I L. R. 35 Bom. 42.

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combine to render necessary the giving of notice under S. 424 as a condition precedent to it." I find that *Sahebzadee Shahumsha Begum* v. *Fergusson* 1, was quoted before the learned Judge, yet, he does not say that a further condition of the applicability of S. 424 is that the act should have been done *bona fide*. There are no Madras reported cases. Mr. Ramesam has referred us to an unreported judgment in Second Appeal No. 1545 of 1901 which is certainly opposed to the view taken in *Sahebzadadee Shahumsha Begum* v. *Fergusson* 1

I shall now refer to the English law on this subject.

Before 56 and 57 Vic. Ch. 61 known as the Public Authorities Protection Act of 1893, there were various enactments which contained provisions for giving notice to public officers before action was brought against them. Most of them were repealed and a comprehensive enactment was passed by Parliament. The first section enunciates a uniform rule of limitation by providing that "the action must be commenced within six months next after the act, neglect or default complained of or in case of a continuing injury or a damage within six months next after the ceasing thereof." The same section provides further that if before action was brought there was a tender of amends, ordinarily costs shall not be awarded against the public servant; and that if in the opinion of the Court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs against the plaintiff. S. 2 repealed all the sections in the various acts which provided that notice of action must be given before action was brought. Therefore after 1893 the only question in England would be whether the public servant was given sufficient opportunity to tender amends and also whether the action had been commenced within six months of the acts complained of. The failure to afford opportunity to make amends would not entail the dismissal of the suit as in the case of failure to give notice, but may result in the plaintiff being mulcted in costs even if he succeeds in the action. This was the state of the law when the new Civil Procedure Code was enacted in this country. If I may say so with respect, the precedent set by the Parliament in repealing provisions for notice and in enacting a uniform rule of limitation might well have been

1. (1881) I. L. R. 7 Cal. 499.

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adopted in this country. But, that has not been done. We have various local acts in which a shorter period of limitation is prescribed in respect of acts done uuder colour of a Statute and we have also the general Procedure Code which makes it a condition precedent to an action against a public servant that he should have notice. Therefore the English decisions subsequent to 1893 can afford no assistance in the construction of S. 80 of the Civil Procedure Code. The earlier decisions are all quoted in Bullen and Leake's Precedents of Pleadings (7th Edition) at page 814. The established rule seems to be to the effect that the public officer is entitled to the statutory privilege of notice only "where he had grounds for believing, and *bona fide* believed, in the existence of facts which, if existing, would have justified him in doing the acts complained of under the Statute or in the execution of his office. In *Downing* v. *Capel* [1] the learned Judges held that unless the wrong-doer believed he was acting in pursuance of the statute he was not entitled to notice. In *Selmes* v. *Judge* [2], Blackburn, J., says, "I agree that if a person knows that he has not under a statutory authority to do a certain thing and yet intentionally does that thing he cannot shelter himself by pretending that the thing was done with intent to carry out the Statute," Lush, J., said, "it is clear that they *bona fide* believed they were doing what the law allowed, and that is all that is needed to entitle them to the protection of the Statute." Hannen, J., said, "The question is: did the defendants *bona fide* intend to make a rate as surveyors of highways? If they did, they were entitled to notice of action." Although this judgment of the learned Judges does not express it in so many words, it seems clear from it that if a public servant acted with a malicious intent, he would not be entitled to any notice. See also *Norris* v. *Smith* [3] and (*Agnew* v. *Jobson and others* [4]).

The result of the above discussion may be stated thus :—

(*a*) In England notice of action after 1893 is immaterial All that is required is that sufficient opportunity, should be given to the public servant to make amends. Failure in this behalf will not entail the dismissal of the suit, but will render the successful plaintiff liable to pay the costs of the public servant.

1. (1867) L. R. 2 Com. Pleas Cases 461. 2. (1871) L. R. 6 Q. B. Cases 724.
3. (1839) 10 Ad. and E. p. 188. 4. 13 Cox's Criminal Cases 625.

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(*b*) Before the Act of 1893 the public servant would not have been entitled to notice if he exceeded the powers given to him by the Statute.

(*c*) He would not have been entitled to notice unless he believed he was acting within the Statute although he was not justified in so acting.

(*d*) He would have been entitled to notice in all cases where he acted *bona fide* although he was mistaken in his view of the law which authorised him to do the act.

(*e*) Lastly any semblance of acting within the Statute would be enough.

In India the preponderance of authority is in favour of holding that unless the public servant acted *bona fide* he is not entitled to notice. Most of the judgments which have taken this view were by single Judges. *Jogendranath Roy Bahadur* v. *Price* [1], holds that the question of *bona fides* is not a matter for consideration on the question of notice. In Bombay, Justice Chandravarkar, at any rate, seems to take the same view. But, it must be conceded that there is not a single case in which it has been held that notice is necessary where it was found that the defendant acted maliciously. There is no such case in the English Reports or in the Indian Law Reports. When the Legislature re-enacted S. 424 of the Old Code in the Act of 1908 it did not think it desirable to reconcile the conflicting views held on this question. On principle it seems to me that to hold that notice should be given only where *bona fides* have been established would be to leave it to the discretion of the plaintiff whether he should give notice or not. It may be suggested in answer to this, that if the allegation as to *mala fides* is not proved the suit might be dismissed. But it would certainly lead to an enquiry into the merits before the question of notice is considered.

In this state of authorities and having regard to the importance of the question, I propose to refer the following question for the consideration of the Full Bench:—

"Where a public officer in the discharge of his duties acts *mala fide*, whether he is not entitled to notice before action under S. 80 of the Act V of 1908."

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*Napier, J.*—The question raised in this second appeal is whether the defendant is entitled to notice under Section 80 of the

1. (1897) I. L. R. 24 Cal. 584.

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Civil Procedure Code, no notice having been given. The suit was one against a Village Munsif, the cause of action alleged being that the defendant fraudulently attached certain casuarina wood and sold the same in a clandestine manner, although it had been already attached by the plaintiffs. The facts found by the Appellate Court are that certain casuarina wood belonging to a third party, a judgment-debtor, had been attached in O. S. No. 387 of 1911 by the plaintiffs, that the Village Munsif sold the wood for arrears of revenue due, that there was some irregularity in this sale, that there was no necessity to sell the whole quantity and that after selling the wood the Village Munsif handed over the balance of purchase money to the judgment-debtor, although he had knowledge of the attachment. He sums up his view of the case as follows:—The first defendant attached *excessively* all the wood belonging to the judgment-debtor so as to get it sold for revenue dues and handed over the balance secretly to the debtor for the purpose of getting rid of the two Court attachments, all of which was in abuse of his powers as Village Munsif. S. 80 is as follows :—

No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months after notice in writing has been delivered to him stating the cause of action and the relief which is claimed.

This section was 424 in the Old Code, the only important alteration being the substitution of the words 'any act' for 'an act.' The finding of the lower Appellate Court is clear that the Munsif *was acting in his official capacity* when he sold the wood, and as the selling is alleged as part of the cause of action, it is to my mind immaterial whether the subsequent paying over of the balance was done in an official capacity or not.

It is not disputed that revenue was due, and the finding of the Court is clear that it is in the excessive attachment of all the wood, that part at all events of the abuse of his powers occurred. On the plain words of the section, it would seem clear that notice was required. But it is suggested that there is strong authority for the proposition that where the officer acts maliciously, no notice is required. In examining the cases it seems to me necessary to eliminate those in which it was found that the officer was only pretending to act in an official capacity he having no right to do

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the act in connection with which the complaint arose at all. There remain two classes; (1) where he has purported to act in his official capacity but has been guilty of malice in the exercise of his powers, and, (2) cases in which he has caused some wrong inadvertently in the discharge of his duty. In *Shahebzadee Shahunshah Begum* v. *Fergusson* 1, it was held by Cunningham, J., sitting on the Original Side, that the cases in which notice is necessary are invariably cases in which a public officer is sued for damages for some wrong inadvertently committed by him in the discharge of his duties. The case was however one in which the plaintiff claimed to be entitled to a share in a certain trust fund, of which the Official Trustee of Bengal was the trustee, and the decision was that no notice was necessary. The point did not arise for decision, and could not on the facts, whether, if he had acted maliciously, he would have been entitled to notice. The *obiter dictum* in this case was expressly negatived in a decision of a Bench of the same Court in *Jogendranath Roy Bahadur* v. *Price* 2. There the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant. The point was taken that as the act was said to be done maliciously S. 424 did not apply, and reliance was placed on the decision above referred to. The Court pointed out that the question did not arise in that case and stated the law as follows:—"The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise." In a later case reported in *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan Raha* 3. Woodroffe, J. sitting on the Original Side held that where a public officer took possession of property which he had no authority to seize and was sued for trespass, the suit is not against him in his official capacity, but as a private individual and therefore no notice is necessary. This case, although relied on by the appellant has in my opinion no bearing on the question, it being of the class first referred to, namely those where the officer is not discharging a duty. The next case was a decision of Fletcher, J. on the Original Side of the High Court in which he held that a suit against a District Magistrate and two officers of Police for conspiracy and malicious arrest and search, was one in which the public officer was sued in respect of an act done in bad faith, and therefore no notice under S, 80 was

1. (1881) I. L. R. 7 C. 499.
2. (1897) I. L. R. 24 C 584.
3. (1903) I. L. R. 36 C 28

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required. He relied on the *obiter dictum* in *Sahebzadee Shahunsha Begum* v. *Fergusson* [1] and also on a decision in *Raghubans Sahai* v. *Phool Kumari* [2]. The latter case has in my opinion no bearing on the question at all. It simply decides that where no relief is claimed against the Secretary of State, no notice is required as it would be impossible to serve a notice fulfilling the requirements of the section. He also relied on a case in *Muhammad Saddiq Ahamad* v. *Panna Lal* [3] to which I shall refer. The learned Judge does not appear to have been aware of the decision in *Jogendranath Roy Bahadur* v. *Price* [4] which was binding on him. His decision was subsequently reversed by the Court of Appeal on the merits and so no ruling was given on this point. So far as the High Court of Calcutta is concerned, the view that no notice is required where the Public Officer acts maliciously has been directly negatived.

Four decisions of Single Judges of the Allahabad High Court were referred to. The first is one of Banerjee, J. reported in *Muhammad Saddiq Ahamad* v. *Panna Lal* [3]. In that case the Court found that the defendant, a Police Officer, did not purport to act in good faith in pursuance of the law, but took advantage of his position as a Police Officer to commit illegal and tortious acts maliciously and without cause, the action complained of being that he searched the house of the plaintiff, dragged him to the thana detained and kept him in confinement for several hours. The learned Judge following the decision in *Sahebzadee Shahunsha Begum* v. *Fergusson* [1], held that no notice was required. The next case is one decided by the same learned Judge and reported in *Baktawar Mall* v. *Abdul Latif* [5]. That was a suit against a Police Officer to recover certain books seized by him in a search, the seizure of which was denied. The learned Judge held that notice was necessary and distinguished his prior decision as being one in which the defendant had acted not in his capacity as a Public Officer, but illegally and in bad faith. He based his decision on the ruling of the Calcutta Bench in *Jogendranath Roy Bahadur* v. *Price* [4]. The third case is one reported in *Mumtaz Hussain* v. *Lewis* [6] the suit being one for damages for assault, the allegation being that the plaintiff, a sub-overseer was assaulted by

1. (1881) I. L. R. 7 C. 499.
2. (1905) I. L. R. 32 Cal. 1130.
3. (1903) I. L. R. 26 All. 220.
4. 1897 I. L. R. 24 Cal. 584.
5. (1907) I. L. R. 29 All. 567.
6. (1910) 7 All. L. J. 601.

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his superior officer in a fit of anger. The Judge held that the acts complained of were not acts purporting to be done by the defendant in his official capacity. The fourth case is one, reported in *Bachcha Singh* v. *Jafar Beg* [1] and was a suit brought to recover damages against a Police Officer for malicious arrest. The learned Judge held that as the officer purported to act in his official capacity, notice was necessary. Putting aside the third of these cases as belonging to the first class, viz , cases where the act does not purport to have been done, we have two decisions of Banerjee, J. which, with all respect, in my opinion, are not reconcileable; and another decision in which it was held that notice was required.

Turning to Bombay, there are several decisions in which the section was construed, namely cases reported in *Babu Balapa* v. *Nana* [2], *Sardar Singji* v. *Ganapat Singji* [3], *Rajmal Manick Chand* v. *Hanmant Anyaba* [4], *Cecil Gray* v. *The Cantonment Committee of Poona* [5], and *Chhegan Lal Kishoredoss* v. *The Collector of Kaira* [6]. These however deal, with the questions whether notice is required in suits against Public-Officers arising *ex contractu* and suits in which no tortious act was alleged but the Public Officer was a necessary party for the determination of the rights of the parties. The extreme view was taken in the last mentioned case in which it was held that even though no tortious act was alleged against the Collector, still as he had been acting in his official capacity in declaring the plaintiff's mortgages illegal in exercise of the power conferred upon him by S. 3 of the Bombay Act V of 1862, which declaration had enabled the mortgagors to take possession of the land, notice was necessary. The Court lays down that the true test of an action for the purpose of S. 424 is whether the wrong complained of as having been done by the Public Officer sued, amounts to a distinct act on his part and whether that act purported to have been done by him in his official capacity. This, it may be pointed out, is the test applied by the only decision of a Bench in Calcutta, *viz.*, *Jogendranth Roy Bahadur* v. *Price* [7].

Turning to the Madras cases, *Anantharaman* v. *Ramasami*, [8] was a suit to recover money due on a promissory note from a minor

1. (1915) 13 All. L. J. p. 788.
2. (1888) I. L. R. 13 Bom. 343.
3. (1889) I. L. R. 14 Bom. p 395.
4. (1895) I. L. R. 20 Bom. 697.
5. (1910) I. L. R. 34 Bom. 583.
6. (1910) I. L. R. 35 Bom. 42.
7. (1897) I. L. R. 24 C. 584.
8. (1888) I. L. R. 11 Mad. 317.

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under the Court of Wards. The Collector being a party as guardian *ad litem*, pleaded that he was entitled to notice. The Court simply stated that no notice is required unless the suit is brought against a Public Officer in respect of an act done by him purporting to be in discharge of his duty, and that clearly this suit was not of that class. There is however one decision, S. A. 1545 of 1901, which directly decides the point. That was a suit against a karnam for damages for malicious prosecution. The karnam had sold certain trees by public auction which were purchased by the plaintiff and cut by him. The defendant reported to the Tahsildar that the plaintiff had cut down more trees than he had purchased and put in a complaint against the plaintiff. The Magistrate tried the case and found that the defendant's story was false. The plaintiff brought this suit, and the issues framed were whether the defendant prosecuted the plaintiff maliciously and without reasonable and probable cause, and whether the suit was not maintainable without notice. It was found by the District Munsif that the defendant was actuated with vindictive spirit and personal motives and did not act *bona fide*. The District Judge returned no finding on the 1st issue, but found that the acts complained of were done in his official capacity and that therefore notice was necessary. In Second Appeal it was urged that no notice was necessary and the Bench held that the decision of the District Judge was right.

There are in all the Courts a large number of decisions on other statutes where the words 'purporting to act' and 'official capacity' are construed. I have not thought it necessary to deal with these because the finding of the lower Appellate Court is clear that the act was one purported to be done etc., and the only question, raised before us was whether malicious action took the case out of the section.

Our attention has been drawn to several English cases in which the words 'act done in pursuance of the act' have been construed for the purpose of ascertaining whether the suit had been brought within a certain time after the act committed. But for the same reasons that I have not thought it necessary to examine the Indian cases other than those on this particular section I do not propose to deal with them.

The result is that there is a distinct ruling that notice is necessary even where the action is malicious, in 24 Cal. 584 and

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another one in our own Court, and there is no decision of a Bench the other way. This being so, I see no reason why we should not give the construction to the language of the section which it naturally bears. I am therefore of opinion that this suit is bad for want of notice. But as my learned brother has doubts in the matter, I agree to the reference to a Full Bench in the terms suggested by him :

[Their Lordships called upon Mr. Prakasam for the respondents :]

*T. Prakasam* for the respondents :—

"Purporting" in "purporting to be done in his official capacity" means "having the purpose of" or "intending." See Century English Dictionary. "Purporting" should not be understood as meaning "pretending" or "affecting." *Shahebzadee Shahunshah Begum* v. *Fergusson.* [1] *Raghubans Sahai* v. *Pool Kumari* [2] accepts the view in *Shahebzadee Shahunshah Begum* v. *Fergusson.* [1] See also *Peary Mohan Das* v. *D. Weston* [3]. The only case against me is *Jogendra Nath Roy Bahadur* v. *Price* [4]. *Ganoda Sundary Chaudrani* v. *Nalini Ranjan Raha* [5] approves of the cases in *Shahebzadee Shahunshah Begum* v. *Fergusson* [1] and *Raghubans Sahai* v. *Phool Kumari* [2]. *The Collector of Bijnor, Manager of the Estate of Chaudhuri Ranjit Singh* v. *Munuvar* [6] is a case of a Collector sued as the agent of the Court of Wards. *Muhammad Saddiq Ahmed* v. *Panna Lal* [7] is a case of a Sub-Inspector of Police committing an illegal and tortious act "intended to be done" in his official capacity in the language of the Police Act. Notice was held not necessary.

[*T. V. Venkatarama Aiyar*:—The learned Judge in *Jugal Kishore* v. *Jugal Kishore* [8] holds that notice is necessary even when the act is not done *bona fide*.]

See however at p. 544 where the learned Judges say that they were not considering a case of *mala fide* action by the public officer.

[*Sadasiva Aiyar, J* :—In *Muhammad Saddiq Ahmad* v. *Panna Lal* [7], the learned Judge found that the police officer did not act even in pretended execution of his office. There he only used his influence outside his office.]

1 (1881) I. L. R. 7 C. 499 at 503.
2 (1905) I. L. R. 32 C 1130 at 1134.
3. (1906) 16 C. W. N. 145 at 214.
4. (1897) I. L. R. 24 C. 584.
5. (1906) I. L. R. 36 C. 28.
6 (1880) I. L. R. 3 A. 20 at 23.
7. (1903) I. L. R. 26 A. 220.
8. (1911) I. L. R. 33 A. 540.

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*Baktawar Lal* v. *Abdul Latiff* [1], referred to. *Ranchod Varajbhai* v. *The Municipality of Dakor* [2], was a case under the Bombay District Municipalities Act.

[*The Chief Justice* :—The language of that Act is "done or intended to be done" which is entirely different from the language of S. 80 of the Civil Procedure Code.]

*Anantharaman* v. *Ramaswami* [3] and S. A. No. 1545 of 1901 (unreported) were also referred to.

[As regards the decisions under similar English Statutes, reference was made to the following cases.] *Hermann* v. *Seneschal* [4], is a case under the Larceny Act, 24 and 25 Vic. Ch. 99, S. 33. The language of the provision was "anything done in pursuance of the Act". *Roberts* v. *Orchard* [5] was a case where the language of the Act was "anything done in pursuance of this Act." *Wedge* v. *Berkely* [6] was a case under 24 Geo. II, Ch. 44 S. 1. The language of the Act was "anything done by him in the execution of his office." *Bona fides* was held to be necessary by the Judges. *Chamberlain* v. *King* [7] was a case under the Larceny Act, S. 113. Reasonable grounds for believing were held necessary. In *Selmes* v. *Judge* [8] the language of the act was "anything done in pursuance of or under the authority of". In *Hughes* v. *Buckland* [9] the language of the Act was "anything done in pursuance of this Act." See at p. 354. In *A. G.* v. *Hackney Co.*, [10] the language under construction was "anything done or intended to be done". In *Parton* v. *Williams* [11] the language was "anything done in the execution of his office". As to *Kirby* v. *Simpson* [12], see Clerk and Lindsell on Torts, 3rd Edn., p. 113, footnote.

*T. V. Venkatarama Aiyar* for the appellant :—

The object of S. 80 of the Civil Procedure Code is to give an opportunity to the officer to tender amends and to prevent the officer being harrassed by frivolous actions. If the officer has to

1. (1907) I. L. R. 29 A. 567 at 568.
2. (1884) I. L. R. 8 B. 421.
3. (1888) I. L. R. 11 M. 317.
4. (1862) 32 L. J. (N. S.) C. P. 43 at 46.
5. (1863) 33 L. J. (N. S.) Exch. 65.
6. (1837) 6 A & E. 663=112 E. R. 256.
7. (1871) L. R. 6 C. P. 474 at 477.
8. (1871) L. R. 6 Q. B. p. 724.
9. (1846) 15 M. & W. 346=15 L. J. Ex. 233.
10. (1875) L. R. 20 Eq. 626.
11. (1820) 3 B. and Ald 330=106 E. R. 684
12. (1854) 10 Ex 358.

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make amends it should not be put to the last after an action is brought and after going fully into the question of the *bona fides* of the Act. There can be no question about the necessity of the notice if the act is done officially. It is only in cases where the Act is done by the officer in his private capacity, that no notice is required. The question of *bona fides* is only an element in considering whether the person did the act in his official capacity or not. It is only a question of fact and it is only this consideration that runs through all the English cases. *Jugal Kishore* v. *Jugal Kishore* [1] referred to. *Venkata* v. *Chengadu* [2] was a case where fraud was alleged and still it was held that the suit came during the shorter period of limitation. See at p. 175. "Purporting to act" is very much like "professing to act." In this case there is no doubt that the act was done in his official capacity because the Karnam cannot attach property for arrears of revenue in his private capacity. Reference was made to the Judicial Officers Protection Act (Act XVIII of 1850.)

*T. Prakasam* replied.

The Court expressed the following

Wallis, C. J

**Opinion**:—*The Chief Justice.*—As observed by Seshagiri Aiyar, J. in his order of reference the point for decision is whether in consequence of his want of *bona fides* the first defendant forfeited his right to notice before suit under S. 80 of the Code of Civil Procedure. Both the referring Judges were of opinion that the act done by the defendant came within the words "any act purporting to be done by such public officer in his official capacity." These words were introduced into S. 424 of the Code of 1877 by Act XII of 1879, and the corresponding S. 80 of the present Code was further amended by substituting "any" for "an" and "such public officer" for "him.". According to the concise Oxford Dictionary recently published at the Clarendon Press, to "purport" in this context means to "be intended to seem". There can be no doubt that the act of the Village Munsif in handing over the surplus proceeds of the revenue sale to the defaulting owner was an act "intended to seem" to be done by him in his official capacity so as to render notice of suit necessary, if effect is to be given to the language of the section according to the natural meaning of the words used. The legislature may well have considered it desirable to require notice of suit to be given in

1. (1911) I. L. R. 33 A. 540 at p. 544. 2. (1888) I. L. R. 12 M. 168. (F. B.)

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all such cases, and I see no reason for putting a restrictive construction upon the section. It is significant that the words "purporting to be done" are wider than "done or intended to be done under the provisions of this Act," in S. 264 of the Public Health Act, which appear to be the most comprehensive words used in any of the corresponding statutory provisions in England, seeing that they also include "acts intended to seem to be done in his official capacity;" and it is quite probable that they were chosen on that very ground and for the purpose of making the English decisions inapplicable. As observed in *Booth* v. *Clive*[1] it is not very easy to reconcile all the observations that are to be found in the English cases, and they must be read with reference to the circumstances of each particular case. Further, the current of English decisions does not in my opinion support the view taken, in *Shahebzadee Shahunshah Begum* v. *Fergusson*[2] that notice is only requisite in the case of inadvertent acts and cannot be required where there is a want of *bona fides*. On the contrary in *Kirby* v. *Simpson*,[3] it was expressly laid down by Parke, B., and the Court of Exchequer that "a person may act maliciously and yet act in the execution of his office as a justice of the peace," and that in such a case notice must be given to him. Similarly in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*,[4] in the Court of appeal, where *Kirby* v. *Simpson* was cited for the appellants, it was not even contended on the other side that the finding of malice against the defendant disentitled him to notice if he was otherwise entitled to it. In the third and most authoritative edition of Bullen and Leake's Precedents of Pleadings, 1868, the learned authors sum up the effect of the decisions on the various English statutes at p. 759 as follows: "A person is entitled to notice of action as acting under or in pursuance of a statute or in execution of his office, where he *bona fide* believes in the existence of facts which, if existing, would justify his acting in pursuance of the statute or in execution of his office." In the present case there were facts justifying the Village Munsif in acting in his official capacity, and there was no occasion for him to resort to the defence that he *bona fide*, though erroneously, believed in the existence of such facts. In so far as *Shahebzadee Shahunshah Begum* v. *Fergusson*,[2] and the cases which follow it

1. (1851) 10 Com. Bench. 827=138 E. R. 327. 2. (1881) I. L. R. 7 C. 499.
3. (1854) 10 Ex. 358. 4. (1892) 1 Q. B. 431.

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Wallis, C. J.

lay down that the section only applies to acts done inadvertently in the course of official duty, I am unable, with great respect, to follow them, as they appear to me to be inconsistent with the plain language of the section, unsupported by the English decisions on the more restricted provisions of the English Acts, and opposed to the later decision of the same Court in *Jogendra Nath Roy Bahadur* v. *Price*, [1] and to the other decisions mentioned in the Order of Reference. My answer is that notice is necessary in the circumstances stated.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J*:—The verb " purport " is defined in the concise Oxford Dictionary as 'convey,' 'state,' 'profess,' ' be intended to seem" ; and the Latin root signifies "carry forth." The synonym "profess" has as two of its definitions 'pretend' and 'openly declare.'

I therefore think that the expression "any act purporting to be done by such public officer in his official capacity" found in S. 80 of the Civil Procedure Code means "any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance." The usual way in which such an intention is conveyed to the minds of others is by the officer openly declaring at or about the time of the doing of that act that he was acting in his official capacity, and by the "act " being in its nature such as is done by a person in such an official position and not by a mere private individual. In most cases, his conduct and declarations at or about the time of the doing of the act and the nature of the act would be conclusive as to their conveying to the minds of those who become cognisant of the act that it was done in his official capacity. An act done by a public officer would " purport " to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

1. (1897) I. L. R 24 Cal. 584

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But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice.

I shall, with diffidence, attempt two illustrations A Sub-Registrar carries off by force his neighbour's plough-bullocks to plough the Sub-Registrar's own lands, making at the time the loudest declaration that he was acting as Sub-Registrar and was entitled as such officer to carry off his neighbour's plough-bullocks to cultivate his (the Sub-Registrar's) lands. As there is no resemblance whatever between the Sub-Registrar's duties and the ploughing of the Sub-Registrar's lands or the carrying off of his neighbour's cattle, I do not think that it could be said that his act "purported" to be done in his official capacity whatever he might have professed. (The line of demarcation may of course become thin in many cases. In *Muhammad Saddiq Ahmad* v. *Panna Lal*,[1] Banerji, J., held that a Sub-Inspector of Police who took advantage of his position as a Police Officer to wrongfully search the plaintiff's house, to keep him for some hours in a thana and to publicly abuse him owing to his private enmity against the plaintiff could not be said to have purported to act in the discharge of his official duty and was therefore not entitled to notice under S. 424 of the old Civil Procedure Code corresponding to the present S. 80. I am doubtful about the soundness of this decision so far as it relates to the acts of house-search and confinement in the thana though as regards the act of public abuse, the decision seems to be right as such public abuse is never the duty of a Police officer). II. My other illustration may be stated thus: A, a Police Inspector, was told by his friend B that B's stolen property was in C's house. A, to help his friend B., forges a magisterial warrant, goes to C's house, and makes a search in his official uniform declaring that he does so as a Police Officer on the strength of the magisterial warrant. As every ordinary on-looker will take it that A is making his search in his capacity as a Police Officer, I think that his act was one purporting to be done in his official capacity, and he is entitled to notice if sued for such an act. (See *Jogendra Nath Roy Bahadur* v. *Price*, [2] (Macpherson and Ameer Ali, JJ.) and

1. (1903) I. L. R. 26 All. 220. 2 (1897) I. L. R. 24 Cal. 584.

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*Jugal Kishore* v. *Jugal Kishore*,[1] though this latter case turned upon S. 49 of the Allahabad Municipalities Act (which, however, uses the same expression "purporting to be done" as S. 80 of the Civil Procedure Code).

The English decisions construing expressions like "done in pursuance of" or "done under the authority of" or "an act in execution of a public office" or "done in execution or intended execution of his office" and so on are not only of very little use but only tend in my opinion to confuse the mind in the interpretation of the expression "purported to be done" used in S. 80 of the Civil Procedure Code.

In the present case, the appellant's act in paying over the balance of the revenue sale proceeds to the defaulter was an act falling within the ordinary duties of his office as Village Munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the Village Munsif's act in so returning the balance to the defaulter to receive the impression that the act was done by the Village Munsif in his official capacity.

I think the question of the good faith or the bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under S 80 of the Civil Procedure Code.

I therefore agree with my Lord in the answer given to the reference.

Spencer, J

*Spencer, J.*:—I agree with the two judgments just pronounced and with the opinion of the Calcutta High Court in *Jogendra Nath Roy Bahadur* v. *Price*[2], that whether the Public Officer's act complained of is legal or illegal, deliberate or inadvertent, notice under S. 80, Civil Procedure Code, is necessary before a suit is instituted. I think, with due respect, that the decisions of the single Judges in *Shahibzadee Shahunshah Begum* v. *Fergusson*,[3] and *Muhammad Saddiq Ahmad* v. *Panna Lal*,[4] were wrong.

We have been asked to construe the words "any act purporting to be done by such public officer in his official capacity"

1. (1911) I. L. R. 33 All. 54.
2. (1897) I. L. R. 24 Cal. 584.
3. (1881) I. L. R 7 Cal. 499.
4. (1903) I. L. R. 26 All. 220.

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as signifying "any act done by such public officer in the honest belief that he was acting in his official capacity."

"Purporting" literally means "holding out", and neither "profess" nor "pretend" is an exact synonym for it. "Profess", as its derivation suggests, generally implies an open declaration in words. 'Pretend' more often than not, is used where that which is held out is not what it really is. I think that the word "purporting" covers a profession by acts or by words or by appearance of what is true as well as of what is not true.

A private individual who personated a Police Officer by wearing a police uniform and carrying a forged search warrant proceeded to search a house, would be "purporting" to act as a Police Officer, though not being a Police Officer, he would not be entitled to notice under this section. A real Police Officer who acted similarly would equally be doing an act "purporting to be done in his official capacity", and would be entitled to notice, even though his motives were malicious.

When it is the intention of Government to protect official and judicial acts done by public servants in good faith, the legislature makes use of the words "good faith", as may be seen from Ss. 76 to 79 and 99 of the Indian Penal Code, S. 156, clause 4 of the Local Boards Act and S. 1 of the Judicial Officer's Protection Act. But in S. 80, Civil Procedure Code, there is no qualification that the act must be one done in good faith to entitle the officer concerned to notice. In practice it would not always be easy at the stage of issuing notice to determine whether good faith existed before that question had been decided at the trial. Government undertakes the defence of their servants in actions brought against them personally for official acts done by them in cases where those acts are deemed defensible. The issue of notice gives time to the Public Officer to make amends for his act or to report the case to Government and get himself defended at the public cost. So notice is made compulsory in all suits against public servants for acts done officially.

A number of English cases have been cited in the arguments and Mr. Justice Seshagiri Aiyar has referred to some of them in his order of reference. I find that little assistance is to be derived from them, as they are all pronouncements as to the meaning of the language used in particular English statutes, which is not identical with the language of the Civil Procedure Code which we have to consider.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE KUMARASWAMI SASTRI.

Keekangote Narayana Tantri ... *Appellant** (*Plaintiff*).

*v.*

Nagappa and others ... *Respondents* (*Defendants*).

*Civil Procedure Code of* 1882, *S.* 373—*Order under—Contsruction—Principle—Application for permission to withdraw with liberty—Order permitting withdrawal without expressly granting liberty—Fresh suit on same cause of action—Maintainability.* Narayana Tantri v Nagappa.

Where, on a petition presented under S. 373 of the Code of Civil Procedure, 1882, for liberty to withdraw from the suit with permission to bring a fresh suit, the Court passed the order "plaintiff is permitted to withdraw from the suit," *held* that the order must be read with the petition and construed as granting it *i. e.*, as granting permission to file a fresh suit.

*Golam Mahomed* v. *Shibendra Pada Banerjee* [1], approved.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Bakewell, dated 19th April 1917 in S. A. No. 669 of 1915* preferred against the decree of the District Court of South Kanara in A. S. No. 260 of 1914 preferred against the decree of the Court of the District Munsif of Kasargod in O. S. No. 437 of 1912.

The Second Appeal came on for hearing before Seshagiri Aiyar and Bakewell, JJ., who delivered the following

**Judgments** :—*Seshagiri Aiyar, J.*—This is a suit by the plaintiff who is the assignee of a usufructuary mortgage for possession. A previous suit was instituted by the assignor for the same purpose in 1902. During the course of that suit, an application was presented by the then plaintiff to withdraw the suit with liberty to bring a fresh suit. The order of the District Munsiff was: "The plaintiff is permitted to withdraw from the suit; he will pay the costs etc." Exhibit III. The present suit was filed in 1912. The Courts below have held that as no permission to bring a fresh suit was reserved in the order, the present suit is barred. Seshagiri Aiyar, J.

I am unable to uphold this conclusion. The order permitting withdrawal must be construed reasonably, and, as pointed out in *Golam Mohamed* v. *Shibendra Pada Banerjee* [1] it should be

* L. P. A. No. 76 of 1917. 14th November, 1917.

1. (1908) I. L. R. 35 C. 990 at 995.

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Seshagiri Aiyar, J

read with the prayer in the petition. So read, there can be no reasonable doubt that the District Munsif intended to grant permission to file a fresh suit.

Further S. 373, of the Act of 1882 and the corresponding provision in the new Code of Civil Procedure (Order XXIII, Rule 1) both contemplate the permission of the Court being obtained only for withdrawal with liberty to sue again. If the Court, for any reason thinks that the liberty should not be given, it ought to dismiss the application. As the learned vakil for the appellant put it forcibly, the Court in dealing with such applications has no jurisdiction to give permission, if it does not want to reserve liberty to sue again. See *Subban Chetty* v. *Latchmi Ammal*, [1] and *Mahant Bihari Dasji* v. *Purushotham Das* [2]. If the Court was of opinion that the liberty should be refused, it was its duty to have intimated that opinion to the plaintiff by dismissing his petition, instead of putting him on the wrong scent by a cryptical order like the present. I feel no doubt that the Court intended to give, and did give, permission in the terms of the petition.

I would therefore set aside the decree of the District Judge and remand the appeal for disposal to him on the merits.

As my learned brother takes a different view, the appeal is dismissed with costs under S. 98 of the Code of Civil Procedure.

Bakewell, J.

*Bakewll, J*:—The question is as to the construction of an order in these terms: "The plaintiff is permitted to withdraw from the suit," which was made upon a petition "that the plaintiff reserving the right to file this suit again may withdraw the present suit without further proceedings." Liberty to bring a fresh suit having been expressly applied for and not having been expressly granted must, I think, be taken, to have been refused.

Under S. 373 of the Code of Civil Procedure of 1882 (Order XXIII Rule 1 of the Code of Civil Procedure of 1908) the plaintiff is under an obligation to obtain such liberty; and the Court in granting it, has to be satisfied that there are sufficient grounds for granting it; that is, it is a matter of judicial discretion to be exercised upon the facts of each case. There is nothing to show that such a discretion was in fact exercised in this case or that the Court intended to grant the order prayed for, and there-

1. 6 M. L. T. 191. 2. (1908) I. L. R. 32 B. 345.

fore the plaintiff has, in my opinion, failed to show that he is not precluded from bringing a fresh suit.

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It is possible that the order was wrong and would have been set right upon an application to review or amend it; but the plaintiff has not chosen to take any steps for the purpose, although nine years have elapsed since the date of the order, and this fact goes to show that he acquiesced in an order terminating his suit.

I would dismiss the appeal with costs.

An Appeal was preferred under Cl. 15 of the Letters Patent.

*T. Rangachariar* for Appellant.

*B. Sitarama Row, H. Balakrishna Row, K. Y. Adiga* and *K. P. Lakshman Rao* for respondents.

The court delivered the following

**Judgment**:—In the original vernacluar petition it is quite clear that what the petitioner asked for was liberty to withdraw with permission to bring a fresh suit.

In these circumstances following *Golam Muhammad* v. *Shibendra Pada Banerjee*[1] we think that the order 'plaintiff is permitted to withdraw from the suit' must be read with the petition and construed as granting it. On the other construction the order is most misleading to the petitioner and not an order contemplated by the Code.

We allow the Letters Patent Appeal with costs, and set aside the decree of the District Judge and remand the appeal to the District Judge for disposal according to law, other costs will abide the result.

A. S. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SPENCER.

K. Gopalakrishna Kudva ... *Appellant* * *(Plaintiff).*

*v.*

Bangle Narayana Kamthy ... *Respondent (Defendant).*

*Malicious prosecution—Damages, suit for—What the plaintiff has to prove—Innocence, proof of, if relevant.*

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The pivot upon which all actions for damages for malicious prosecution turn, is the state of the mind of the prosecutor at the time he institutes or authorises the prosecution.

*Corea* v. *Peiris* [2].

In an action for damages for malicious prosecution the plaintiff must prove: (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3)

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* A. S. No. 393 of 1915. 17th January, 1918.

1. (1903) I. L. R. 35 C. 990.
2. (1909) L. R. A. C. 549.

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that the defendant acted without reasonable and probable cause and (4) that the defendant was actuated by malice. The question of the plaintiff's innocence apart from the acquittal, is only an element of consideration in deciding whether the prosecution ended favourably for the plaintiff, whether there was an absence of reasonable cause for the prosecution and the amount of damages to which the plaintiff is entitled.

*Hicks* v. *Faulkner* [1], *Abrath* v. *North Eastern Railway Co.* [2], *Pestonji Muncherji Mody* v. *The Queen Insurance Co.* [3], *Cox* v. *English Scottish* and *Australian Bank* [4], *Harischunder Neogy* v. *Nishi Kanta Banerjee* [5], *Nalliappa Gounden* v *Kailappa Gounden* [6]. Ref. to.

Appeal against the decree of the court of the Subordinate Judge of South Kanara in O. S. No. 8 of 1914.

*C. Madhavan Nair* and *K. P. Madhava Row* for Appellant.

*K. Srinivasa Aiyangar* and *B. Sitarama Row* for Respondent.

The Court delivered the following

**Judgment**:—The plaintiff's suit which was brought to recover Rs. 3,500 as damages for malicious prosecution was dismissed in the court of the Subordinate Judge of South Kanara and the plaintiff appeals. The plaintiff was the managing trustee of Shri Venkataramana temple of Mulki and the defendant complained to the Sub-Divisional Magistrate of Mangalore that the plaintiff had, as trustee, committed offences of criminal misappropriation and criminal breach of trust in respect of the temple properties. At the trial, the plaintiff was discharged under S. 253 of the Criminal Procedure Code by the Magistrate on July 15th, 1912.

For the purpose of this case we may leave out of consideration those allegations of the defendant which merely imputed breach of the rules framed under the award of arbitrators for the management of the temple, and we may at once proceed to those charges in which an element of criminal dishonesty was disclosed by the prosecutor's allegations. In the defendant's complaint, which was prepared by counsel, he specified eight acts of the plaintiff as constituting offences of the above description under the Penal Code. Of these the most substantial were (1) that the accused had constructed a golden palanquin and had misappropriated about 4 seers of gold of the value of Rs. 2,000 by charging the temple with the value of 30 seers of gold while utilising only 26 seers; (2) that the accused had debited the temple with Rs. 400 worth of fire-works

1. (1878) L. R. 8 Q. B. D. 167.
2. (1883) 11 Q. B. D. 440=L. R 11 A. C. 24.
3. (1900) I L. R. 25 B. 332.
4. L. R. (1905) A. C. 168.
5. (1901) I. L. R. 28 C. 591.
6. (1900) I. L. R. 24 M. 59.

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for use at festivals although the amount really spent was only Rs. 200 and that he had misappropriated the difference, (3) that Rs. 4,843 had been paid into court about six months previously, but had not been brought into the temple accounts and that the accused was using the same for his own purposes, and (4) that the accused had misappropriated 50 muras of rice and Rs. 10 collected as offerings to the temple. In his sworn statement to the Magistrate, the defendant further alleged that if the temple cash chest was examined, it would be found that there was a deficiency in the money on hand when compared with the amount stated in the accounts.

The first charge, namely that of misappropriating Rs. 2,000 worth of gold is a very serious one and in our opinion was quite unwarranted by the information of which the defendant was at the time possessed or by what has since transpired. When the defendant was in the witness-box and was asked upon what basis he made this allegation, his only explanation was that many people were saying that the plaintiff undertook the work of repairing the palanquin with a view to commit misappropriation and that he also believed that the plaintiff was going to misappropriate the gold. He admitted that he had not personally examined the goldsmith who made the palanquin before he complained to the Magistrate. The only information that he had was that which Vasudeva Sanbhogue and Hari Pai gave him. These persons have not been examined as witnesses, and it is clear from the defendant's own statement that he had no information that could justify him in making the statement that the accused had misappropriated this large amount of gold. The Magistrate's judgment shows that this charge was dropped at the trial as the prosecution found it to be groundless.

The second allegation of importance, which is the 4th charge in Ex. C, namely, that the accused had misappropriated Rs. 4,843 belonging to the temple was equally unjustifiable. This money had been recovered by a suit instituted on behalf of the temple and the money was in the hands of the vakil who represented the temple. In the vakil's hands, it was presumably quite safe. The defendant admitted in cross-examination than he knew that the amount had been paid to the vakil. Yet he had the audacity in his complaint to declare that the accused was utilising the same for his own purposes. The fact that this money was not entered

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in the temple accounts as having been paid to the vakil would not justify the defendant in making such an accusation, when, as he admits, he had no information that the plaintiff had actually misappropriated the amount.

The next accusation, which is number 3 in serial order, is that the accused had misappropriated about Rs. 200 shown as spent on fireworks by means of entries in the accounts showing payments to certain fictitious persons. When he was asked about this, the defendant stated that, before the institution of the criminal complaint, all he knew was that the plaintiff had made it appear in the accounts that fireworks had been purchased from unlicensed vendors; but he did not know the names of the persons from whom the purchases had been made. He gathered from the fact that it was entered in the accounts of the plaint temple that fireworks had been obtained from unlicensed persons, that the plaintiff must have misappropriated the money under this head of expenditure. That again seems to have been a reckless and unwarranted assumption. He stated that the payments had been shown in the accounts as having been made to several fictitious persons, but he took no trouble to ascertain whether the persons shown as having sold the fireworks were really fictitious. As observed by Lord Atkinson in *Corea* v. *Peiris* [1], the pivot upon which all such actions turn is the state of the mind of the prosecutor at the time that he institutes or authorises the prosecution.

In *Hicks* v. *Faulkner* [2], *Hawkins, J.*, defined reasonable and probable cause to be "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

Applying these tests, it can only be concluded on the evidence that the defendant must have acted without reasonable or probable cause when he accused the plaintiff of misappropriation and criminal breach of trust with respect to the above mentioned three charges.

The fourth of the charges which we need consider relates to the misappropriation of 50 Muras of rice and Rs. 10. At the

1. L R (1909) A. C. 549. 2. (1878) L. R. 8 Q. B. D., 167.

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criminal trial, an entry of Rs. 246 in the accounts was shown as representing the value of these 50 Muras of rice and Rs. 10. The accused had not brought this item into the general accounts, but had kept it under the head of "Kadanadhaya". The prosecution failed to prove that this entry of Rs 256 related to any money received from any other source. The statement that the accused had misappropriated this amount was not justified, but as the defendant might have entertained some reasonable suspicion from the manner in which the entry was made in the accounts we do not think that, in respect of this item, there was entire absence of reasonable cause.

As regards the defendant's allegation that there was a deficiency in the cash balance, the Magistrate found on examination Rs. 492 as the deficiency. But this was accounted for by a loan of Rs. 510 granted upon the pledge of jewels as evidenced by an entry in the account book seized at the search. As the Magistrate observed, there was no reason to suppose that there had been any falsification of accounts or misappropriation of money in respect of these items. At the same time, we do not consider that the defendant's statement in this respect was without reasonable cause, as there was an actual shortage of cash.

On the whole, we cannot agree with the Subordinate Judge in his finding that no case has been made out of malicious prosecution. Leaving aside the statement made in the complaint with regard to inaccuracies in the accounts or to irregularities in the plaintiff's conduct as trustee, there are at least three serious accusations of misappropiation, which the defendant had no justification for making. We are of opinion on the first issue that the complaint in question was in these respects made without any reasonable and probable cause.

There is also no doubt from the evidence that the defendant's action was dictated by malice. Shortly before the accusation was made, the plaintiff had excommunicated the defendant. The defendant retaliated by accusing the plaintiff of defamation. The defendant in his evidence admitted that there had been misunderstanding between him and the plaintiff in the year 1907 in consequence of dealings which they had with one another in respect of a mortgage transaction which resulted in civil litigation. The manner in which the defendant raked together every conceivable charge in his endeavour to procure the conviction of

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his enemy and to cause him the maximum amount of difficulty in defending himself spells vindictiveness. It was provided in the scheme sanctioned by the award of arbitrators for the conduct of the temple affairs that this defendant and others might inspect the accounts at any time for ascertaining whether they were properly kept and that the temple money was properly accounted for. Instead of proceeding accordingly and inspecting the accounts before launching the criminal prosecution, the defendant rushed into court and attempted to make criminal charges out of trifling irregularities which might very well have served as grounds for the applying for the removal of the trustee in proceedings properly instituted for that purpose in a Civil Court, but not for his prosecution.

As Mr. K. Srinivasa Aiyangar in his arguments for the respondent has raised the question whether the plaintiff in an action of this kind is bound to prove his innocence, and as the Subordinate Judge's judgment contains a remark that the plaintiff had not proved his innocence by the mere fact he was discharged in the Magistrate's Court it is necessary to say a few words on this point. It is well settled that, in actions for malicious prosecution, the plaintiff must prove four things :— (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, and (4) that the defendant was actuated by malice. Under the second and third heads, questions as to the plaintiff's innocence generally arise. But they must, we think, be regarded only as incidental to the questions whether the prosecution ended in the plaintiff's discharge or acquittal, and whether the defendant acted without reasonable or probable cause. In *Abrath* v. *North Eastern Railway Company* [1] where the plaintiff had been acquitted of the criminal charge and the jury had expressed the opinion that he left the court without a stain upon his character, and his innocence was not challenged by the defendants at the trial of his action for malicious prosecution, Bowen, L. J., as he then was, in discussing the onus of proof in such cases, observed that the plaintiff in an action for malicious prosecution must prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. As already observed, no

1. (1883) 11 Q. B. D. 440.

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question as to proof of innocence arose in the case, and we do not think that the learned Lord Justice intended to do more than lay down that the prosecution must be shown to have ended favourably to the accused. The substance of the judgment was that proof of innocence was not by itself *prima facie* proof of want of reasonable and probable cause. This would appear to be the view taken by Sir Frederick Pollock in his well-known work on Torts, as after citing Bowen, L. J.'s observations in the text, he observes in a note—" A plaintiff who, being indicted on the prosecution complained of, has been found not guilty on a defect in the indictment is sufficiently innocent for this purpose." It is in the same sense that the word " innocent" appears to have been used by Lord Macnaghten in *Pestonji Muncherji Mody* v. *The Queen Insurance Company* [1], and by Lord Davey in *Cox* v. *English, Scottish and Australian Bank Ltd.*, [2] and by Maclean, C. J , in *Harish Chandra Neogy* v. *Nishi Kanta Banerjee* [3]. In some cases, the innocence of the plaintiff has been treated as an element of consideration that enters into the question whether the defendant acted without reasonable and probable cause. If in *Nalliappa Gounden* v. *Kaliappa Gounden* [4] the learned Judges intended to lay down that something further must be proved in suits of this nature beyond proof that the prosecution ended favourably for the accused and that there was an absence of reasonable cause in the prosecution, then we think that they went too far and that Lord Bowen's observation above referred to does not support their dictum to that extent. Failure to prove more than this may be relevant to the question of damages. In our opinion the Subordinate Judge misdirected himself in observing that the fact of the plaintiff having been discharged by the Magistrate was no proof of his innocence, and in assuming apparently that the plaintiff was *prima facie* guilty and that he was bound affirmatively to prove his innocence. In parts of his judgment, *e. g.*, paragraphs 69, 104 and 107, the learned Subordinate Judge has applied to the plaintiff's conduct the test whether his motive was righteous or unrighteous, which is of course quite beside the point. We cannot accept the view of the Subordinate Judge in paragraph 108 of his judgment that 'the plaintiff has failed to establish his innocence in respect of any one of the accusations.'

1. (1900) I. L. R. 25 B. 332.
2. L. R. (1905) A. C. 168.
3. (1901) I. L. R. 28 C. 591.
4. (1900) I. L. R. 24 M. 59.

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As regards damages, the plaintiff states that he had to pay about Rs. 2,500 as vakil's fees in defending himself at the criminal trial. Exhibit B series are receipts for Rs. 1,150 passed by certain pleaders in his favour. In allowing this appeal and reversing the decision of the Subordinate Judge, we allow the plaintiff altogether Rs. 2,000 as damages, and we direct the defendant to pay the plaintiff's costs in this and in the lower Court.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM and MR. JUSTICE KUMARASWAMI SASTRI.

Lagadapati Venkata Nagabhushanam. *Petitioner* (1st defendant.)*

*v.*

Garlapati Mahalakshmi and others. *Respondents (Appellants and Respondents 2 and 3.)*

Venkata Nagabhushanam v. Mahalakshmi.

*Godaveri Agency Rules, Rr. 8 and 16—Dismissal of suit for default by Assistant Government Agent—Appeal to Agent—Order of Agent directing Assistant Agent to restore the suit to his file and try the same—High Court—Revision.*

A plaintiff whose suit was dismissed for default by the Assistant Government Agent appealed to the Government Agent of the Godaveri District, who without hearing the defendant, directed the suit to be restored to the file of the Assistant Agent to be heard and disposed of according to law. The defendant preferred a petition to the High Court under R. 8 of the Agency Rules, to direct the Agent to review his judgment. *Held*, that the order of the Agent was not a decree within the meaning of R. 8 and therefore the petition to the High Court was incompetent. *Sri Pedda Vikrama Deo Garu* v. *The Maharaja of Jeypore*, followed.

The proper remedy of the petitioner was to submit a petition to Government under R. 16 of the Agency rules and the Government might, if necessary refer the petition to the High Court

Petition under Rule 8 of the Agency Rules for Godaveri District, praying that in the circumstances stated therein the High Court will be pleased to direct the Government Agent of Godaveri, to review his order in D. Dis. No. 52/Ag. of 1916 dated 4th February 1916, reversing in appeal the order of the Assistant Agent of Bhadrachalam Division, dated 19th July 1915, refusing to restore Original Suit No. 25 of 1913 on the file of his Court.

*P. Narayanamurthi* for the Petitioner.

*P. Somasundaram* for the Respondents.

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* C. M. P. No. 349 of 1917. 1st August 1917.

1: (1916) 4 L. W. 499.

Venkata Naga-bhushanam v Maha-lakshmi.

The court delivered the following

**Judgment**:—The first respondent brought a suit against the petitioner in the court of the Assistant Agent in the Godaveri district for dissolution of partnership and other reliefs. The suit was dismissed for default. Then the plaintiff appealed to the Agent, who without hearing the defendant in the suit set aside the order dismissing the suit for default and directed that the suit be restored to the file of the Assistant Agent to be heard and disposed of according to law. Against this order of the Agent, the present Civil Miscellaneous Petition has been preferred asking us to direct the Agent to review his order according to rule 8 * of the Agency Rules. But that rule applies only to decrees passed by the Government Agent and to judgments leading to decrees.

A preliminary objection is taken that the order of the Agent directing that the suit be restored to file is not a decree within the meaning of the Agency Rules. We think that this contention is sound. The point has been decided in *Sri Pedda Vikrama Deo Garu* v. *The Maharaja of Jeypore* [1], following a number of other decisions of this Court. There a decree is understood as meaning the same thing as a decree under the Civil Procedure Code, for the Agency Rules themselves do not contain any definition of "decree." We see no reason for differing from that interpretation. What, however, was argued by the learned Vakil for the petitioner was that though the order of the Assistant Agent dismissing the suit for default is not a decree, yet the order of the Agent setting aside that order and directing the restoration of the suit is an adjudication of the rights of the parties within the meaning of the definition of 'decree' as given in the old Civil Procedure Code. But it is difficult to accept this contention. The right contemplated by that definition is not a right to the benefit of certain rules of procedure, that is, to have an order of court set aside by which the plaintiff's suit has been disposed of without trial. We may observe that rule 16† of the Agency Rules

* **Rule 8**:—"All decrees passed by the Government Agent on appeal from decrees of his subordinates shall be final the High Court having the power on special ground for him to require to review his judgment as may be directed by them'.

† **Rule 16**: "All petitions against the proceedings of the Government Agent must, in the first instance, be submitted to the Government, and will be referred, when necessary, either to the High Court or to the Board of Revenue, as the case may be."

1. (1916) 4 L. W. 499.

Venkata Nagabhushanam v. Mahalakshmi.

provides that all petitions against the proceedings of the Government Agent must, in the first instance, be submitted to the Government and then it is open to the Government to refer the matter to the High Court or to the Board of Revenue, as the case may be. There can be no doubt that the Government Agent in this case was not justified in setting aside the order dismissing the suit for default without giving an opportunity to the defendant to be heard.

The proper remedy of the petitioner is to submit a petition to the Government and it is for the Government, if it so chooses, to refer the petition to the High Court for disposal. The present petition must be dismissed with costs.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Ponnusami Pillai ... *(Appellant* (1st defendant.)*

*v.*

Singaram Pillai (minor by father and next friend Kumaraswami Pillai) and others. *Respondents (Plaintiff and defendants 2 to 5.)*

*Evidence Act Ss. 33 and 165—Suit to enforce registration of a will-Judgment based on evidence adduced before the registering authorities and treated as evidence in the suit by consent of parties—Judgment unsustainable.*

In a suit under S. 77 of the Registration Act to enforce registration of a will which the Registrar had declined to register, the court below based its judgment solely on the evidence adduced before the registering authorities but which was treated as evidence in the suit by the consent of both the parties There was nothing to show that the conditions prescribed by S. 33 of the Evidence Act existed so as to justify the reception of the evidence. Nor was it shown that the evidence was relevant under any other section of the Evidence Act.

*Held* that, having regard to the stringent provisions of S. 165 of the Evidence Act, the judgment of the court below was unsustainable as it was based on irrelevant evidence.

*Sri Rajah Prakasarayanim Varu* v. *Venkata Row* [1], dissented from.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 74 of 1915.

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*A. S. No. 149 of 1917. 20th February 1918.

1. (1912) I. L. R. 38 M. 160.

Ponnusami Pillai v. Singaram Pillai.

*Dr. Swaminathan* for Appellants.

*T. V. Muthukrishna Aiyar* and *N. Muthuswami Aiyar* for Respondents.

The Court delivered the following

**Judgment**:—Appellant in this case takes the preliminary ground that the judgment cannot be supported in view of the provisions of S. 165 of the Indian Evidence Act.

The suit was brought under S. 77 of the Registration Act to enforce registration of a will which both the Sub-Registrar and District-Registrar had declined to register. The Subordinate Judge says (paragraph 4 of his judgment)..........." The parties filed the evidence adduced before the registering authorities as evidence in this case by mutual consent. None of them wanted any further evidence to be adduced in this Court. They were content to argue the case on the evidence adduced before the registering authorities."

The evidence in question on a consideration of which the case was decided included the statements of 9 witnesses for plaintiff and 8 witnesses for defendant recorded by the Sub-Registrar. These statements could duly become relevant evidence in the present case, if the conditions prescribed by S. 33 of the Indian Evidence Act were found by the Subordinate Judge to exist. There is nothing even to suggest and it cannot be contended, that the Subordinate Judge applied his mind to the question decided (for instance) that the presence of the witnesses could not be obtained without unreasonable delay and expense; his judgment shows that he proceeded solely on the ground of the consent of parties. That is to say, the statements recorded by the Sub-Registrar were not relevant under S. 33 of the Indian Evidence Act; and the learned vakil for respondent is unable to suggest any other section under which they would be relevant. But S. 165 of the Indian Evidence Act lays down that the judgment must be based upon facts *declared by this Act* to be relevant and duly proved; and the consent of parties cannot take the place of a declaration of the Evidence Act.

Our attention has been drawn to a decision of this court in *Sri Rajah Prakakasarayanim Varu* v. *V. Venkata Row* [1] in which it might appear that the consent of parties was held to be sufficient. But the attention of the learned Judges does not seem to have been drawn to the stringent provisions of S. 165 of

1. (1912) I. L. R. 38 M. 160.

Ponnusami Pillai v. Singaram Pillai.

the Indian Evidence Act above quoted ; and with all respect, we think we are justified in declining to follow their decision.

We must therefore set aside the decree and judgment of the Lower Court and direct that the suit be restored to file and disposed of according to law.

In view of the fact that appellant has raised this plea after consenting to the course adopted by the Subordinate Judge, we direct him to bear his own costs in this Court. Respondents' costs in this Court will be costs in the cause as well as all costs hitherto incurred by both sides in the lower Court.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD, AND JUSTICE SADASIVA AIYAR.

Munia Goundan v. Ramasami Chetti.

Murajalli Munia Goundan ... *Appellant.** (*3rd Defendant.*)

*v.*

Ramasami Chetti, and others ... (*Respondents, and Plaintiff. Defendants Nos. 1, 2 and 4 to 10.*)

*Limitation Act Arts.* 126, 144 *and* 148*—Applicability—Hindu Law (Mithakshara)—Joint Family—Usufructuary mortgage of family property by father and son—Subsequent sale of entire property by father and possession obtained by vendee on redemption—Suit by son or his alienee to recover his (son's) share of property on payment of proportionate mortgage amount—Limitation—Starting point.*

Family property owned in equal moieties by a Hindu governed by the Mithakshara Law and A, his undivided son, was mortgaged with possession by them both to B in 1892. The entire property was in 1897 sold to C by the father as though it were his self-acquisition. In April 1898 C paid up the mortgage amount, obtained possession of the property and remained in possession thereof, all along claiming an absolute right to the entire property. On his father's death A, however, sold his half-share in the property to D. In a suit instituted on 26th August 1912 by D against A, B and C for possession of A's half-share in the property on payment of the appropriate proportion of the mortgage amount, *held* that the suit was governed by Art. 126 of the Limitation Act and, having been filed more than 12 years after the possession of C began, was barred.

Per *Sadasiva Aiyar, J.*—Even if Art. 126 did not apply to the case and Art. 144 did, the suit was barred thereunder.

Observations on the scope and applicability of Art 126.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Salem in Appeal Suit No. 99 of 1915 preferred against the decree of the Court of the District Munsif of Dharmapuri in Original Suit No. 702 of 1912.

*G. S. Ramachandra Aiyar* and *E. Ramaswami Aiyar* for Appellant.

*T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar* for Respondents.

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* S. A. No. 1 of 1917. 12th February, 1918.

Munia Goundan v. Ramasami Chetti.

Oldfield, J.

**Judgments** :—*Oldfield, J.*:—The facts admitted or found are that 1st defendant and his father Gopal Row, mortgaged their property to 2nd defendant with possession under Exhibit I. Gopal Row afterwards sold the equity of redemption, as though the property were his self-acquisition, to 3rd defendant by Exhibit II. The lower appellate court has found and we accept its findings, that the property belonged to the family and the sale does not bind 1st defendant. After Gopal Row's death, 1st defendant sold to plaintiff by Exhibit A and plaintiff now sues for possession of 1st defendant's share on payment of the appropriate proportion of the mortgage amount, which 3rd defendant has paid. The question is whether the suit, filed on 26th August 1912, is in time. It will be if the Article of Schedule I, Limitation Act, applicable is No. 148. It may be, if the Article is No. 144 and 3rd defendant's possession, which, it is not disputed, began in 1898, was not adverse to 1st defendant and plaintiff. It will not be if the Article is No. 126.

It is simplest to disregard for the present the distinction between Articles Nos. 144 and 126. The substantial question is then whether the suit is for redemption or for possession, subject no doubt to the satisfaction of 3rd defendant's lien. It is brought in effect by one co-owner, represented by plaintiff, for recovery of mortgaged property redeemed by another co-owner and now in possession of his transferee, 3rd defendant; and argument has turned on whether Article No. 148 or 134 would apply to the case thus simplified. The question has not been dealt with by this Court. But the conclusion reached in Allahabad and Bombay is in favour of the latter. It was no doubt held in *Ashfaq Ahmad* v. *Wazir Ali* [1], that, when one co-heir of a mortgagor had redeemed the whole mortgage the suit against his representative was subject to Article No. 148. But recently, when that decision was considered in *Jai Kishan Joshi* v. *Budhanand Joshi* [2], the question being whether Article 134 should be applied against a transferee from a redeeming co-owner on the assumption that the latter had the equivalent of a mortgage right, one learned Judge held with reference to the principle stated in S. 95, Transfer of Property Act, he was only a charge-holder and applied Article No. 144 whilst the other concurred, observing with reference to the earlier decision that the possession of the charge-

1. (1889) I. L. R. 14 All. 1. 2. (1915) I. L. R. 38 All. 138.

Munia Goundan v. Ramasami Chetti.

Oldfield, J.

holder need not be regarded as in all respects equivalent to that of a mortgagee. The view taken in *Ashfaq Ahmad* v. *Wazir Ali* [1], was not adopted in *Vasudev* v. *Balaji* [2], or in other cases decided by the Bombay High Court and referred to therein or in *Bhaiji Shamrao* v. *Hajimiya Mahomed* [3]. The objections made to the reasoning in these authorities are that the Transfer of Property Act was not applicable to the facts, the mortgage in the later Allahabad case having been executed before it and the act not being applicable to the Bombay Presidency at the time, and that the distinction between the positions of a mortgagee and a charge-holder or as he is called in the Bombay cases, alienor; has been abrogated since the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* [4]. The first is unsubstantial, the principle involved not depending on the Act for its validity. The second was no doubt not noticed in the judgments in question. But it cannot affect the conclusion. For the Privy Council held only that a simple mortgage was to be treated as equivalent to a charge for the purpose of Article No. 132, not that every charge was a mortgage for the purpose of Article No. 134. And the argument is unsustainable, because 3rd defendant's right, being equivalent only to that of Gopal Row, is, as the cases referred to show, not based on the principle of subrogation recognised in S. 101, Transfer of Property Act. For neither Gopal Row nor 3rd defendant became or could have become absolutely entitled to the property so far as 1st defendant's share was concerned. As *Danappa* v. *Yamnappa* [5] and other cases referred to in *Rushan Ali Khan Chowdury* v. *Kali Mohan Moitra* [6] show the right is to contribution and is secured only by a lien. These considerations applied to the present case, decision must be that plaintiff's suit is not for redemption and is not subject to Article No. 148.

The question is then between Articles Nos. 126 and 144, the contention in connection with the latter being that enquiry must be held to ascertain the date, at which 3rd defendant's possession became adverse to 1st defendant and plaintiff. It is urged that the lower appellate court has already dealt completely with the matter in its reference to 1st defendant's alleged acquiescence; but that is

1. (1889) I. L. R. 14 All. 1.
2. (1902) I. L. R. 26 Bom. 500.
3. (1912) I. L. R. 14 Bom. L. R. 314.
4. (1907) I. L. R. 30 Mad. 426.
5. (1902) I. L. R. 26 Bom. 379.
6. (1906) 4 Cal. L. J. 79.

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only one aspect of it. The decision in *Bhavrao* v. *Rakhmin* [1] has been referred to as negativing 3rd defendant's right to an enquiry; but it is not clear that it can be applied to the facts in the cases before us. To these facts Article No. 126 is exactly applicable; and it was applied to similar facts in *Ramaswamy Aiyar* v. *Vanamamalai Aiyar* [2] the superfluity of any enquiry as to the character of defendant's possession being pointed out. The suit being subject to Article No. 126 and having been filed over thirteen years after the possession of 3rd defendant began, is out of time and must be dismissed with costs throughout, the District Munsif's decree being restored and the appeal being allowed.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.*:—The 3rd defendant is the appellant. The suit was for redemption of ¼th share in a certain property half of which was mortgaged for Rs. 700 in 1892 to the 2nd defendant by the 1st defendant and his father who owned the said half share in equal moieties of ¼th and ¼th. The plaintiff is the purchaser of the 1st defendant's ¼th share. The other half share in the property belonged to one Narasayya but we are not concerned with that half share in the suit.

The 1st defendant's father and Narasayya sold the entire property to the 3rd defendant and to another person (who transferred his rights afterwards to the 3rd defendant) for Rs. 2,000. As regards Narasayya's half share which was sold for Rs. 1,000, there is no dispute in this suit. As regards the other half share which the 1st defendant's father sold for the remaining Rs. 1,000 the 1st defendant's father is found to have had no right to sell the 1st defendant's ¼th share out of that half share. Thus the 3rd defendant, so far as title is concerned, has the same only to the extent of ¾th share. As there was a mortgage for Rs. 700 in 1892 on both the quarter shares which belonged to the 1st defendant, and to his father in favour of the 2nd defendant and as half of that Rs. 700 or Rs. 350 is binding on the 1st defendant's ¼th share now vested in the plaintiff, the plaintiff offers in the plaint to pay Rs. 350 and seeks to redeem the said ¼th share on payment of the said Rs. 350.

As I said already, the 1st defendant's father sold away both the ¼th shares in 1897. Though the 2nd defendant was the original mortgagee under the mortgage of 1892, as the 3rd defendant after his purchase in 1897 paid up in April 1898 the

1. (1898) I. L. R. 23 Bom. 137.
2. (1914) 26 I. C. 873.

Munia Goundan v. Ramasami Chetti.
Sadasiva Aiyar, J.

Rs. 700, mortgaging to the 2nd defendant out of the sum of Rs. 1,000 (the price he paid to the 1st defendant's father for the half share) and is in possession of the half share from April 1898, this suit for redemption of ¼th share is really directed against the 3rd defendant.

Several defences to the suit were raised by 3rd defendant (the appellant before us), but I think it is necessary to consider only the defence of limitation. The plea of bar by limitation is based on the fact that from April 1898, the 3rd defendant has been in adverse possession (claiming as full owner) till the date of suit (August 1912) that is for more than 14 years. Articles 126 and 144 of the Limitation Act are relied upon.

The District Munsif upheld the plea of limitation without mentioning in his judgment the Article of the Limitation Act on which he relied. The Subordinate Judge on appeal held that the suit was not barred by limitation because the mortgage of 1892 for Rs. 700 was payable only in June 1902 which was within 12 years of the date of the plaint (August 1912). His judgment also does not refer to any of the Articles of the Limitation Act. He gave a decree for redemption in favour of the plaintiff on payment of Rs. 350 and of half of the value of the improvements. (The claim for improvements even if the plaintiff was entitled to redeem was put forward by the 3rd defendant on the ground that the plaintiff's vendors knew of the sale of 1897, that the 3rd defendant redeemed and got into possession in April 1898 and that 3rd defendant made improvements of large value to plaintiff's knowledge without objection on plaintiff's part). The Subordinate Judge quotes from the District Munsif's judgment without dissent as follows:—"He" (the plaintiff) "stood by when these", that is the improvements, "were made. He knew of the sale and of the 3rd defendant's posssession". Then the learned Subordinate Judge says:—"*there is no dispute to the claim for compensation.* But the claim" (that is, the amount due for the value of the improvements) "should be proved by the best evidence". The Subordinate Judge therefore refused to accept the amount of Rs 4,000 claimed by the 3rd defendant as the value of the improvements and directed the issue of a commission by the lower court to exactly ascertain such value before passing the final decree for the redemption of the ¼th share.

Munia Gounden v. Ramasami Chetti.

Sadasiva Aiyar, J.

As I said, it is necessary for the disposal of this appeal to consider only the question of limitation. I am clear in my opinion that Article 125 of the Limitation Act applies to this case. That Article provides a limitation period of 12 years for a suit by a Hindu governed by the Mitakshara law "to set aside his father's alienation of ancestral property," the period being calculated from "when the alienee takes possession of the property." It has been held under the analogous Article 44 relating to a suit by a minor whose property was alienated by his guardian that the expression "suit to set aside a transfer of property" includes a suit in which there is a prayer for consequential relief of possession. (See *Annamalay Chettiar* v. *Pitchu Ayyar* [1]). I am also clear that the Article 126 which speaks of a suit "to set aside" the father's alienation of ancestral property denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit (see Rustomjee's Limitation Act, page 326 quoting 1914 P. R. 70). The present suit is by a person claiming from a Hindu (the 1st defendant) governed by the law of the Mitakshara to set aside the said Hindu's (1st defendant's father's) alienation of ancestral property to the extent of the 1st defendant's share and for consequential relief of possession by redemption. The alienee (the 3rd defendant) took possession of the property in April 1898 and, as more than 12 years had elapsed from that date before the date of suit, the suit is barred under this Article. Mr. T. R. Ramachandra Aiyar for the respondent contended that the Article 126 (first column when it uses the words "to set aside his father's alienation of ancestral property" means "to set aside his father's alienation of ancestral property *provided the alienation was made by the father alleging that it was ancestral property or at least without alleging that it was not ancestral property.*" I see no reason whatever to add any such words as those italicized by me to the first column of the Article. Mr. Ramachandra Aiyar relied upon the decision of their Lordships of the Privy Council in the case reported in *Balwant Singh* v. *R. Clancy* [1] *et seq.* to the effect that when an elder brother mortgages a property as if he was the sole owner and not as the manager of the family consisting of himself and his younger brother, the creditor is not entitled to prove that the younger brother's share was also bound by the

1. (1904) I. L. R. 28 Mad 122. 2. (1912) I. L. R. 34 All. 296 (P. C.)

Munia Goundan v. Ramasami Chetti.

Sadasiva Aiyar, J.

mortgage as executed by the *de-facto* manager for necessary family purposes. In the first place, it is not easy to see what the above observation has to do with the interpretation of Article 126. Further, their Lordships clearly make a distinction between an alienation by an elder brother and an alienation by a father. They state at page 303: " It need not hardly be said that Sheoraj Singh " (the alienor elder brother) " was not an ancestor or a predecessor of Maharaj Singh " "(the younger brother)." The Legislature and the Hindu Law do make a distinction between an alienation by a father of ancestral property and that by any other person who was a mere manager.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under Article 126 need *not* be for consideration. It is also significant that Article 126 applies alike to an alienee with and to an alienee without notice. (See *Bhavrao* v. *Rakhmin* [1]). The Legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice.

Mr. Ramachandrier further argued that the words in the third column of Article 126 "when the alienee takes possession of the property " means "when the alienee takes possession of the property *by the sole and unaided virtue and effect of father's alienation* " and that where the alienee gets possession by redeeming a previous usufructuary mortgage the date of such possession given by the mortgage will not form the starting point under the third column and so apply Article 126. Here again I see no reason whatever to add to the plain language of the Article. Supposing for instance the alienation by the father is made one year after a trespasser had deprived the father of his possession of the property and the alienee after his alienation sues the trespasser

1. (1898) I. L. R. 23 Bom. 137 (F. B.) at page 142.

and gets into possession, can it be argued that the són can come in more than 12 years afterwards treating the alienee's possession as that of a mere co-sharer and treating Article 126 as not applicable because the alienee had to sue the trespasser in order to get possession.

Assuming however that Article 126 is not applicable, I think that the suit is barred also under Article 144. In *Vasudev* v. *Balaji*, [1] the facts were as follows :—V and G, co-owners of a land mortgaged it in 1872. V alone redeemed it in 1882 and obtained possession and he and his heirs asserted adverse and exclusive title to the whole and continued in possession till 1898, Then G's heirs brought a suit in 1898 for redemption of their half share. Jenkins, C. J. and Crowe, J. held that the co-owner who redeemed the whole of the mortgage was not a mortgagee and did not stand in the shoes of the mortgagee, that he was a mere charge-holder, that a charge-holder can assert and claim adverse possession and that after 12 years the charge could not be redeemed by the other co-sharer as the title by adverse possession became perfected. The learned Judges held that Article 148 applied only to a suit against a mortgagee and not to a suit against a person who obtained a charge by paying up the mortgagee. In this connection, it might be remarked that under S. 95 of the Transfer of Property Act, one of several co-mortgagors who redeems the mortgaged property and obtains possession thereof does not himself become the mortgagee but is given only a charge on the share of the other co-sharers for the proportion of the expenses of redemption and of obtaining possession. In this case, it is clear on the proved documents and the facts found by the lower appellate court that the 3rd defendant when he purchased in 1897 had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to the first defendant's father's ¼ share, and that he took possession in April 1898 with the animus to hold the whole half share against all the world and not as a mere co-sharer with the first defendant in that half share. That possession of immoveable property is notice to the whole world of the title under which possession is held, and that possession is *prima facie* adverse and exclusive are well known principles of law. See *Mager Brahma* v. *Bholi Dass*, [2]. Of course, a mortgagee

1. (1902) I. L. R. 26 B. 500 2. (1914) 20 I. C. 195.

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Sadasiva Aiyar, J.

or a co-sharer or a tenant who first obtains possession *as such* cannot without notice to the mortgagor or to the other co-sharers or to the landlord (as the case may be) claim to hold adversely, that is, by mere unilateral declaration of intention he could not convert his original possession into the adverse possession, but in this case the possession was obtained from the very beginning under an assertion of exclusive title.

The date fixed for the redemption in the mortgage of 1892 has no relevancy on the question of adverse possession as it is not a mortgagee who sets up adverse possession but a purchaser from one of the co-mortgagors (see Freeman on Co-tenancy, S. 224 at pages 296 and 297.)

In the result, I hold that the suit is clearly barred by limitation under Article 126, and even if Article 126 does not apply, under the general Article 144 and I would therefore set aside the decree of the lower appellate court and restore that of the District Munsif with costs payable by the plaintiff to the 3rd defendant throughout.

A. S. V.

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## IN THE COURT OF JUDICATURE AT MADRAS.

### [FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR, MR. JUSTICE SPENCER.

Saminatha Aiyar ... *Appellant* (Plaintiff).*

*v.*

Govindasami Padayachi and others., *Respondents (Defendants Nos. 3, 4 and 5).*

F. B.

Saminatha Aiyar v. Govindasami Padayachi.

*Madras Act II of* 1864, *Ss.* 59 *and* 63—*Sale of minor's property for arrears of Revenue—Patta standing in the name of mother—Suit to set aside sale—Limitation—Whether S.* 59 *applies—Regulation X of* 1831, *if applicable—Whether Ryotwari Estates come within S.* 2 *of Regulation X of* 1831.

Regulation X of 1831 applies to all estates of minors, permanently settled or ryotwari, of which the Court of Wards can assume management, irrespective of the magnitude of the estate.

S. 59 of Act II of 1864 does not apply to sales for arrears of Revenue, which are illegal, as contravening S. 2 of Regulation X of 1831, which prohibits the sale of estates of minors inherited by them for arrears of Revenue accruing during their minority.

The fact that the patta for a minor's properties was wrongly issued in the name of an adult does not preclude the minor from invoking the aid of Regulation X of 1831.

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* S. A. No. 1465 of 1916. ... 18th March, 1918.

F. B.
Saminatha Aiyar
v.
Govindasami Padayachi.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Appeal Suit No. 25 of 1916, preferred against the decree of the Court of the District Munsif of Valangiman in Original Suit No. 40 of 1912.

The Court (Seshagiri Aiyar and Bakewell, JJ.) made the following

Order of Reference to a Full Bench.

The facts of the case are not in dispute. The appellant, plaintiff, was taken in adoption by a ryotwari land-holder. The pattah for the lands in dispute stood in his name. After his death, the pattah was transferred to the name of the adoptive mother. She did not pay the Government revenue, and the lands were brought to sale and purchased by the 2nd defendant. The suit is to recover possession. The Subordinate Judge has found that there was no fraud on the part of the 1st defendant in allowing the property to be sold for arrears of revenue. We accept that finding. He has further found that the suit is barred by limitation as it was brought more than six months after the plaintiff attained his majority; *vide* S. 59 of the Madras Revenue Recovery Act.

The main argument before us was that S. 59 of the Act has no application to the facts of this case. The property was admittedly sold when the plaintiff was a minor. Regulation X of 1831 S. 2, enacts that no property of a minor shall be sold for arrears of revenue. S. 63 of Act II of 1864 provides "Nothing in the Act shall be held to bar the operation of the provisions of Regulation V of 1804 and of Regulation X of 1831 in respect to the sale of lands of minors and other disqualified land-holders." It seems therefore that the sale of the land was without jurisdiction. S. 44 of the Act which permits a sale for non-payment of revenue must be read subject to S. 63 of the Act which in terms preserves to minors the rights they enjoyed under Regulation X of 1831. It was however held in *Raja Goundan* v. *Raja Goundan*, [1] that a sale of a minor's property under Act II of 1864 is covered by Section 59 of the Act. Reliance was placed in that Judgment upon *Gobind Lal Roy* v. *Ramjanam Misser* [2]. In this latter case, the Judicial Committee had to deal with a case to which the provisions of the Bengal Revenue Recovery Act was applicable and they pointed out that irregular as well as illegal sales should be appealed against to the Commissioner. We do not think that pronouncement is any

1. (1893) I. L. R. 17 Mad. 134  2. (1893) I. L. R. 21 Cal. 70.

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authority for the proposition that a sale which is prohibited by a legislative enactment should be regarded as a proceeding *intra vires* the powers of the Collector so as to invite the provision of S. 59 of the Act.

The next point is whether the present sale is not against the provision of Regulation X of 1831. It was contended on the authority of *Krishna* v. *Mekam Peruma,* [1] that the estate of the minor referred to in the Regulation must be of such magnitude and importance as can be managed by the Court of Wards. Regulation V of 1804 which was in force when Regulation X of 1831 was passed makes no reference to the extent of the property which alone can be taken under the control of the Court of Wards.

Ordinarily, no doubt, the Court will not interfere with private management where the estate is not considerable; but there is no ground for saying that the Regulation provides only for a particular class of estates. In our opinion, *Krishna* v. *Mekam Peruma,* [1] is not reconcilable with the language of either Regulation V of 1804 or of Regulation X of 1831. Moreover, there is no evidence in this case that the authorities considered that the estate should not be taken up by the Court of Wards. It does not follow that because the Court did not take up the management, it would not have done so, if appealed to.

Mr. Muthia Mudaliar next argued that as the pattah stood in the name of the adoptive mother and as she was the defaulter, the property was rightly sold under the Act. S. 2 of Reg. X of 1831, speaks of the estate having come to the minor by inheritance, and prohibits the sale of such an estate. The provision for sale where the pattadar makes default cannot be spelled out of th s Regulation. It is true that *Subramania Chetty* v. *Mahalingasami Sivan* [2] holds that the revenue authorities are not bound to give notice to the real owner, so long as the pattah stands in the name of some other person. That was a case of vendor and purchaser. There has been no similar decision in the case of father or mother and son. *Subramania Chetty* v. *Mahalingasami Sivan* [2] refers specially to Regulation XXVI of 1802 which relates to the case of a purchaser not taking steps to have the registry transferred to his name. Moreover, it is doubtful whether in the face of S. 2 of Regulation X of 1831, the provision of Act II of 1864 which enables a sale where the person in

1. (1886) I. L. R. 10 Mad. 44. 2. (1908) I. L. R. 38 Mad. 41.

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whose name the pattah stands makes default in the payment of revenue are applicable to the sale of properties belonging to minors.

As there are earlier decisions of this Court which we think require reconsideration, we have resolved to refer the following questions for the opinion of the Full Bench :—

(1) Whether a sale of a minor's property under Act II of 1864 is a proceeding to which S. 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale ?

(2) Whether Regulation X of 1831 only applies to such estate of the minors as are ordinarily taken charge of by the Court of Wards ?

( ) Whether the fact that the pattah stood in the name of the mother of the minor, precludes the latter from invoking the aid of Regulation X of 1831 ?

*T. R. Venkatarama Sastri* and *S. Panchapakesa Sastri* for the Appellant :—The preamble to Reg. X of 1831 recites the doubts that were entertained as to the applicability of the provisions of Reg. V of 1804, prohibiting the sale for arrears of revenue of estates of minor's under the management of the Court of Wards, but were not in fact so taken up. Ryotwari holdings can also be taken charge of by the Court of Wards. There is no statutory provision laying down the magnitude of the estate, whose management can be assumed by the Court of Wards. The Standing Orders of the Board of Revenue fix a limit.

*Krishna* v. *Mekam Peruma* [1] was a case in which only some of the joint proprietors were minors. It was held that such an estate could not be taken under the control of the Court of Wards.

The power of sale for arrears of revenue is conferred by Reg. XXVI of 1802. Reg. XXV, XXVI and XXVII of 1802 must be taken together. All of them apply to ryotwari lands also. See preamble to Reg. XXVI, and *Seshagiri* v. *Pichu* [2] *Secretary of State* v. *Ashtamurthi*[3] and *Subramania* v. *Mahalingaswami* [4].

S. 2 of Reg. X of 1831 prohibits the sale of a minor's estate for arrears of Revenue. S. 63 of Act II of 1864 says that the provisions of Reg. V of 1804 and Reg. X of 1831 are not

1. (1886) I. L. R. 10 M 44.
2 (1887) I. L. R. 11 M. 452.
3. (1889) I. L. R. 13 M. 89.
4. (1908) I. L. R. 33 M 41.

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overridden by that Act. So the sale of the plaintiff's property is illegal and without jurisdiction, *Lakshmayya* v. *Bolareddy* [1]. *Raja Goundan* v. *Raja Goundan* [2] purporting to apply the decision in *Gobind Lal Roy* v. *Ramjanam Misser* [3] holds that a sale prohibited by law is only an irregularity. But the Privy Council decision was based on the special provisions of Bengal Revenue Recovery Act. Under that Act, all objections to the sale must be taken up before the Commissioner. So their Lordships refused to go into the alleged illegality as it was not taken before the Commissioner. *Balkishan Das* v. *Simpson* [4] seems to make a distinction between sales not at all authorised by law and sales which would be valid under the Bengal Acts if the illegality or irregularity alleged by the objector be negatived. In *Muhamad Jan* v. *Ganga Bishen Singh* [5] the Privy Council lay down that the test for jurisdiction is to see whether there is the legal power to sell. See also *Secretary of State* v. *Raja Goundan* [6] and *Dhiraj Chunder Bose* v. *Hari Dasi Debi* [7].

Where the sale is *ultra vires* the period of limitation is not the shorter period laid down in S. 59 of Act II of 1864 but the longer period for recovery of possession provided in the Limitation Act. *Raman* v. *Chandan* [8] *Jankdhari Lal* v. *Gossain Lal* [9], *Nandan Missir Lala Harak* v. *Narain* [10].

The patta in this case stood in the name of the mother. Reg. XXVI of 1802 does not say that the heir should get his name registered. It is the duty of the officer in charge to get the land registered in the name of the true heir. The error of the revenue officer cannot affect the plaintiff's rights; *Secretary of State* v. *Ashtamurthi* [11]. A minor is incapable of acting for himself. He cannot get himself registered as the pattadar. The cases are to the effect that a transferee who fails to get his name registered is affected by a sale brought about by the default of his transferor.

*S. Muthia Mudaliar* for the Respondents.

Reg. X of 1831 does not apply to Ryotwari lands. A Ryotwari holder is not a proprietor within the meaning of S. 2. While Reg. XXVII of 1802 has been expressly extended to Ryotwari lands by S. 6 of Reg. II of 1806. Reg. XXVI has not been so extended.

1. (1908) 18 M. L. J. 129.
2. (1893) I. L. R. 17 M. 134=4 M. L. J. 85.
3. (1893) I. L R. 21 70. (P. C.)
4. (1898) I. L. R. 25 C. 833. (P. C.)
5. (1911) I. L. R. 38 C. 537.
6. (1898) I. L. R. 22 M 5.
7. (1914) I. L R. 42 C. 765. (P. C.)
8. (1891) I. L. R. 15 M. 219.
9. (1909) 13 C W. N. 710.
10. (1910) 14 C. W. N. 607.
11. (1889) I. L. R. 13 M. 89.

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The power of sale for arrears of revenue can be claimed only under Reg. XXVI. I have not been able to find any case of sale of Ryotwari land prior to 1862.

Even assuming that Reg. X of 1831 applies to Ryotwari lands the sale in contravention of the Regulation is only an irregularity. The sale is voidable not void, and a suit to set aside the sale must be brought within six months as laid down in S. 59 of Act II of 1864.

Further in this case the land stood in the name of the mother. She denied the adoption of the plaintiff. So far as the Revenue authorities are concerned the registered pattadar is the owner. The Revenue sales are not affected by the fact that the real owner is some one other than the registered pattadar. It has been the policy of the Legislature to rid revenue sales of all complications. See *Subramania* v. *Mahalingaswami* [1].

*The Chief Justice.*—It was a case of transfer.

*S. Muthiah Mudaliar.*—Yes. I submit that the case is applicable to cases of inheritance also.

*Venkatarama Sastri* in reply—The applicability of Reg. XXVI of 1802 to Ryotwari lands has been accepted in the previous cases. The argument that because S. 6 expressly extends Reg. XXVII to Ryotwari lands the other regulations do not apply, is not tenable S. 4 of Reg. II of 1806 is wide enough to bear out my contention. All estates paying revenue direct to Government can be taken charge of by the Court of Wards. Many are not ordinarily under its management because of the limit fixed by the Board of Revenue. See S. 14 of Reg. V of 1804,

The Court expressed the following

Wallis, C. J.

**Opinion**:—*Wallis, C. J.*:—I do not think that the decision in *Krishna* v. *Mekam Peruma*, [2] is any authority for the proposition mentioned in the order of reference. In that case, a sale of a permanently settled mitta at a time, and in respect of arrears which accrued due, when some but not all of the joint proprietors were minors, was held not to be prohibited by Reg. X of 1831. The learned Judges were of opinion that an estate so owned was not one of which the Court of Wards could have assumed management under Reg. V of. 1804, and that Reg. X of 1831 only applied to estates " which might have but had not been taken

1. (1908) I. L. R. 33 M. 41. 2. (1886) I. L. R. 10 Mad. 44.

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under the Court of Wards". Reg. V of 1804 imposed no restriction on the Court of Wards with reference to the nature of the minor's property, and consequently the reasoning of the learned Judges in *Krishna* v. *Mekam Peruma*, [1] has no bearing on the present case where the sole owner of the land is a minor. It has, however, been strenuously contended before us that, as the minor's lands are ryotwari, they are not an estate within the meaning of Regulation X of 1831, and that the sale of ryotwari lands during minority is not prohibited by the Regulation. The estates of minors under the management of the Court of Wards had been protected from sale for arrears of Revenue by Regulation V of 1804, and Regulation X of 1831 recites that doubts had been entertained as to the liability of the estate of a minor not taken under the management of the Court of Wards to be sold for arrears of revenue. The doubts must have arisen with reference to S. 5 of Regulation XXVI of 1802 which empowered the Collector " where lands may be attached for arrears of revenue" to cause the lands of the defaulting proprietor to be sold. This Regulation must be read with Regulations XXV and XXVII of 1802 which were passed on the same day. It is, no doubt, true, as appears from Ss. 1 to 3 of Regulation XXV, that it was then the intention to fix a permanent assessment on all lands liable to pay revenue to Government but this was to be a gradual process, and the intention was soon abandoned. The provisions of Regulation XXVI, however, are not limited to such cases. The preamble recites the necessity that the property of landed estates being *malguzary* or paying revenue to Government, should in the event of default be liable to sale for the purpose of making good the public revenue assessed on such lands and shows that it was not intended to limit the power of sale to cases of permanently settled lands only. By S. 2 the Collectors are required to keep public registers for the purpose of registering the landed property paying revenue to Government, terms which are perfectly general, as are also the terms of the succeeding sections. S. 5 confers a power of sale where lands may be attached for arrears of revenue, and the subject of attachment for arrears of revenue was dealt with by the succeeding Reg. XXVII of 1802. In that Regulation again 'proprietor' was defined so as to include "all actual proprietors of land who pay the revenue assessed upon their estates immediately to Government."

1. (1886) I. L, R 10 Mad. 44.

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Regulation II of 1806, which provided for the establishment of Zillah or District Courts in Districts in which the Permanent Settlement had not been introduced, enacted in Clause 4, that "in cases where the engagements may be contracted with the ryots or individual occupiers of land they shall be regulated by the Regulations of A. D. 1802 and by such subsequent Regulations as may particularly apply to them." S. 6 also provided that Regulations XXVII and XXVIII should be extended to all Districts in which Zillah Courts might be established under the Regulation, and should be observed by Collectors as well as Zemindars or farmers in their engagements with the ryots or immediate occupiers of the soil. The necessity for this provision, so far as Collectors are concerned, is not apparent, but however this may be this express extension of Reg. XXVII cannot be construed as meaning that Reg. XXVI was not to apply to ryotwari lands. It has always been treated as applicable to them. *Seshagiri* v. *Pichu*, [1] *Secretary of State* v. *Ashtamurthi* [2], *Subramania Chetty* v. *Mahalingasami Sivan* [3]. It is no doubt true that sales of ryotwari lands for default of payment of revenue were at first rare, and that the coercive process provided by Reg. XXVII was usually resorted to, a procedure, it may be observed which might eventuate in sale. There is, therefore, no foundation for the contention that ryotwari lands owned by minors do not come within the protection of Regulation X of 1831 and the answer to the second question is that there is no such distinction as suggested.

As regards the third question, the answer must be in the negative. It was the duty of the responsible officer under Reg. XXVI of 1802 to register the plaintiff as the owner on his father's death, and the fact that he erroneously registered the widow of the deceased cannot affect the plaintiff's rights, and would of itself render the subsequent sale for arrears of revenue in question void as regards the minor, apart altogether from the Regulation, as held in *Secretary of State* v. *Ashtamurthi* [2].

In *Subramania Chetty* v. *Mahalingaswami Sivan* [3], the Bench of three Judges were dealing with a case where the registered proprietor had transferred his interest but the transfer had not been registered and was therefore void as against

1. (1887) I. L. R. 11 Mad. 452. 2. (1889) I. L. R. 13 Mad. 89.
3. (1908) I R. 33 Mad 41.

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Government by the provisions of S. 3 of Regulation XXVI, and the registered proprietor was therefore held to be the defaulter under the Revenue Recovery Act. That decision does not apply to the present case.

The answer to the first question must also be in the negative. S. 63 of the Revenue Recovery Act II of 1864 provides that nothing therein shall be held to bar the operation of the provisions of Regulation X of 1831 in respect to the sale of lands of minors and other disqualified proprietors. This clearly renders the provisions of S. 59 of that Act inapplicable to cases protected by Regulation X of 1831, and it is unnecessary to rely on the further ground that, even in the absence of S. 63 the provisions of S. 59 would not apply to lands exempted from sale by statute.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J*:—I agree.

Spencer, J.

*Spencer, J*:—I agree as to the answers to be given to the questions in the order of reference. I must confess to having been a little puzzled by the form in which the second question has been put. It would indeed be strange if the scope of an enactment were to be limited by notions of what is a considerable estate or of what estates are ordinarily taken charge of by the Court of Wards seeing that 'ordinary' and 'considerable' are relative terms. No doubt it is within the discretion of the Government, upon receiving the reports of Collectors, to decline to order the Court of Wards to superintend particular estates of incapacitated proprietors (*vide* Chapter III of Madras Act I of 1902). But I can find no authority for the suggestion that an estate must be of any definite size or must not be an estate of ryotwari lands in order to give the Court of Wards jurisdiction over it.

In Regulation V of 1804 the only description given of the estates to which the Regulation applies is that they must be estates of land or other property paying revenue directly to Government. This would include the holding of a minor ryotwari pattadar. The Regulation provided for the appointment of guardians by the Zillah Court to minors succeeding as heirs to the joint possession of estates; and Regulation X of 1831 extended this provision to the heirs of single as well as joint possessors of estates, but it was afterwards repealed in 1890 by the Guardians and Wards Act so far as it related to the property of minors not under the superintendence of the Court of Wards. This may have been in consequence of the

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decision in *In re Subramanayan*, [1] as to the powers of the District Court over minors under Act XIV of 1858. The second section of Regulation X of 1831, which forbade the sale for arrears of revenue, accruing subsequently to his accession, of estates of minors not under the charge of the Court of Wards has remained ever since unrepealed. This includes the estates of minor sole proprietors not under the charge of the Court of Wards, like that of the plaintiff in this suit. This section and the preamble to the Regulation and the foot-note to S. 20 of Regulation V of 1804 make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards, and this answers the second question referred to us. But, of course, if a minor is a member of a joint Hindu family governed by the Mitakshara Law and as such has at birth merely an undivided interest in an estate, no guardian can be appointed by Court as the manager of the family represents the family, and to such cases the Regulation will not apply.

N. V.

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PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI AND SIR W. PHILLIMORE, BART.

P. C.

Rai Ganga Pershad Singh v. Ishri Pershad Singh.

Rai Ganga Pershad Singh Bahadur ... *Defendant*-Appellant.*

*v.*

Ishri Pershad Singh and others ... *Plaintiffs-Respondents.*

*Mortgage—Mortgage deed—Attestation—Direct evidence of execution required—Transfer of Property Act, (Act IV of 1882) S. 59.*

The requirement as to attestation contained in S. 59 of the Transfer of Property Act, 1882, (Act IV of 1882) is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the act.

When, therefore, the only evidence was that the attesting witnesses were on one side of a purdah and the executant of the deed, a purdahnashin lady, on the other: that her son took the deed behind the purdah, returned with it bearing a signature purporting to be hers, and said it had been signed by her, and that the witnesses thereupon attested:

*Held*, that the terms of the Statute had not been complied with and that the mortgage was void.

*Shamu Patter* v. *Abdul Kadir Ravuthan* [2] followed.

*Padarath* v. *Ram Nain Upadhia* [3] distinguished.

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* 1st February 1918.

1. (1883) I. L. R. 6 Mad. 187.

1. (1912) L. R. 39 I. A. 218=35 Mad. 607.

2. (1915) L. R. 42 I. A. 163=37 All. 474.

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It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below: and their Lordships declined to assent to respondents prayer for such a remand in the present case.

Appeal from a decree of the Calcutta High Court, dated August 12, 1909 reversing a decree of the Additional Subordinate Judge of Durbhanga.

The plaintiffs-respondents sued to recover Rs. 12,875 due on a registered mortgage bond dated 1893 executed by Musammat Sharbat Koer as certificated guardian of Balmukund Das. The latter, who had since come of age, confessed judgment, but the suit was opposed by the present appellant, who had purchased the mortgaged properties in execution of a money decree, and who contended *inter alia* that the suit was time barred.

The Subordinate Judge found this issue in respondents' favour and dismissed the suit. His finding was based on the ground that the suit was brought more than six years after due date and the bond was not valid as creating a mortgage charge. The material part of his judgment is as follows:—

The bond in suit is dated 23rd August 1893, and the time of repayment of the debt was stipulated to be within 6 months from the date of the bond. The time of 6 months so fixed ended on the 23rd February 1894, and from this date the period of limitation must have begun to run. To enforce the mortgage charge created under the bond the limitation was 12 years from the due date, and to obtain a personal decree for a money-debt under the bond the limitation was 6 years from that date, and there can be no dispute about these propositions of law. The suit on the bond was instituted on the 23rd February 1906, that is to say, after a lapse of 6 years from the due date and within 12 years from it. It is evidently clear, therefore, that if the bond was not valid as creating a mortgage-charge, the entire suit of the plaintiffs would fail as being barred by limitation. The question, therefore, arises whether the bond in suit can operate as a mortgage-bond.

The defendant No. 4 contends under S. 59 of the Transfer of Property Act, that the execution of the bond not having been duly attested as required by that Section, it cannot operate as a mortgage-bond. The executant of the bond was Sharbat Koer, the certificated guardian-mother of the defendant No. 1. S. 59 of the Transfer of Property Act provides that a mortgage can be

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effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Attestation means the attestation by witnesses of the execution of the bond (*vide* Indian Law Reports, Vol. 27, Cal., pages 190 to 194). The execution of a document means and includes the signing and sealing and delivery of it. The question is, therefore, whether the bond in suit was attested as required by S. 59 of the Transfer of Property Act, as failing which the mortgage purporting to have been created by it could not be effected. The ruling reported at 2 Cal. Weekly Notes (note portion), page CCCXIX, lays down "that in order that a mortgage-deed may be validity attested under S. 59 of the Transfer of Property Act, it must "be attested by two witnesses each of whom has seen the deed "executed &c." The plaintiffs have examined in this suit two attesting witnesses of the bond. These witnesses are Ajodhya Pershad and Jharkhandi Pershad, both of them say in plain terms that they did not see Sharbat Koer sign the bond. Jharkhandi further says that none of the attesting witnesses of the bond saw Sharbat Koer sign the bond. The witness Ajodhya says that he did not see her (Sharbat Koer) sign the bond. From these statements it is transparently clear that the attesting witnesses did not see the bond being executed by Sharbat Koer, and this being so, no mortgage was, in view of the terms of S. 59 of the Transfer of Property Act, effected by the bond.

* * * * *

The result is, therefore, that the plaintiffs have failed to prove the execution of the bond as required by S. 59 of the Transfer of Property Act, and, consequently, the bond cannot be taken to have effected a mortgage. Now, that the bond is not a mortgage-bond and the plaintiffs are not entitled to sue upon it to enforce a mortgage-charge and now that the suit to enforce a money-debt is out of time having been brought after a lapse of 6 years from the due date, the whole suit on the bond is barred by limitation.

On appeal the High Court (Stephen and Digambar Chatterjee, JJ.) reversed this decision and decreed the suit. They held there was due attestation of the bond. "To hold otherwise," they said, "would be to upset what we believe is a different practice in cases of the execution of deeds by purdanashin ladies, and in many cases to make attestation of their signatures almost mpossible".

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Hence this appeal.

*De Gruyther, K.C.*, and *Dube* for Appellant.

*Dunne, K.C.*, and *N. N. Sen* for Respondents.

*De Gruyther, K.C.*, for appellant: The bond here was not duly attested: no one saw the purdahnashin lady Sharbat Koer sign. To have a valid mortgage in India two witnesses at least must see the executant sign: *Shamu Patter* v. *Abdul Kadir Ravuthan* [1].

(*Dunne*: The effect of that judgment has been much whittled down in a later case).

The subsequent case is *Padarath* v. *Ram Nain Upadhia* [2]; there it was found that the witnesses had seen the actual hand of the lady signing and recognised her voice. The facts here are widely different. (He was stopped.)

*Dunne, K. C.*, for respondents: No issue on this precise point was raised: it arose incidentally on a question of limitation: the debt was time barred unless covered by a mortgage. There is evidence that the lady executed and that witnesses were present; only they were on one side of the purdah and she on the other.

(*Sir W. Phillimore*:—If the document went in blank and came out signed, and no one else were there but the lady, and the son said he did not sign, it might be sufficient.)

I submit I am entitled to a remand on account of the change in the authorities.

(*Viscount Haldane*:—The second case may be supported by saying the witnesses who attested *did* see—they saw the hand and heard the voice.)

I submit *Shamu Pattar's case* only lays down that an attesting witness must be present at the execution itself, as distinguished from one who receives an acknowledgment afterwards. *Sight* only comes in from English cases, where there are no pardahnashins.

(*Viscount Haldane*:—Is not the point narrower? Has this document been attested by two witnesses?)

*Sir W. Phillimore*:—Haven't you got an affidavit?) No,

*Viscount Haldane*:—And we must take the facts as you have them. It is your own witness: he says what the son told him.

*Sir John Edge*:—On the evidence the case can only be decided as it was decided by the Subordinate Judge.

1. (1912) L. R. 39 I. A. 218. 2. (1915) L. R. 42 I. A. 163.

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*Sir W. Phillimore*:—Your application is in the air.)

When the appeal was heard by the High Court in 1909 there had been a case which held it was not necessary that you should see a purdahnashin woman sign.

(*Sir W. Phillimore*: —In the former case the point had not been discussed in the Court below.)

Their Lordships' judgment was delivered by

Viscount Haldane.

*Viscount Haldane*:—This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others. The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by S. 59 of the Transfer of Property Act. 1882. S. 59 enacts that: "Where the principal money secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses." Now the question is : What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Mussammat Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a purdanashin lady, and the account given by the respondents' own witnesses of what happened was this: She was behind the parda when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the parda and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of S. 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged, as is the case in some statutes, but "attested" only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter* v. *Abdul Kadir Ravuthan and others* [1]. In that case it was held, settling the

1. (1912) L. R. 39 I. A. 218.

P. C.

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Viscount Haldane.

law as to the interpretation of the words to which their Lordships have referred in S. 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present case, at any rate, much nearer. It was a case of *Padarath and others* v. *Ram Nain Upadhia and others* [1] The head note is as follows:—

"A mortgage deed purported to be executed by two pardanishin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the face of the executants, they heard them speak and recognised their voices.

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said; "Here is the deed which my mother has executed." That, in their Lordships' opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about pardanishin ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which

1. (1915) L. R. 42 I. A. 163=37 All. 474.

reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below.

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Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the Courts below.

Solicitors for Appellant :—*T. L. Wilson & Co.*

Solicitors for Respondents :—*Ranken Ford* and *Chester*.

A. P. P.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR

A. Subba Rao ... *Petitioner (Plaintiff).*

*v.*

Parasurama Pattar ... *Respondents (Defendants).*

Subba Rao v. Parasurama Pattar.

*Indian Limitation Act S. 19—Letter stating that no assignment deed was shown and that 3rd parties claimed the debt—if acknowledgment may be implied—Construction of documents purporting to be acknowledgments.*

Where, in answer to a letter of the plaintiff, who was an assignee of a debt, asking the defendant debtor to credit the money in a particular way, the defendant wrote a letter stating that no deed of assignment was shown to him, that there were counter-claimants claiming the amount for themselves and that he could not therefore credit the amount as desired ;

*Held*, that the statement in the letter amounted to an acknowledgment of liability.

An acknowledgment may be implied as well as express and may be spelt out if it be shown that the liability is subsisting. *Sukhamni Chowdhrani* v. *Khan chunder Roy* [1] followed

Documents purporting to be acknowledgments ought to be liberally construed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of South Malabar at Palghat dated 20th July 1916 in S. C. S. No. 363 of 1916.

*K. Govinda Menon* for Appellant.

*T. R. Ramachandra Aiyar* and *A. Sivarama Menon* for Respondents.

The Court delivered the following

**Judgment** :—The plaintiff's suit was dismissed by the Subordinate Judge on the ground that it was barred by limita-

C. R. P. No. 1096 of 1916. 12th October 1917.

1. (1898) I. L R. 25 C. 844.

Subba Rao. v. Parasurama Pattar.

tion. He held that Ex. B did not contain an acknowledgment of liability. I am unable to agree with him. It is necessary to state the facts which led to the writing of Exhibit B, before deciding whether it contains an acknowledgment of liability. The plaintiff was a subscriber to a chit fund of which the defendant was the manager. The assignor of the plaintiff was entitled to some money from this defendant and the plaintiff's case is that that money was assigned to him. Thereupon he wrote to the defendant a letter asking him to credit towards the chit the amount due under the assignment deed in his favour and to pay him the balance of the subscription amount. In reply to that Exhibit B was written. Ex. B contains these statements. You have not shown me the deed of assignment under which you make the claim. Further I have been issued an Injunction Order prohibiting me from paying the amount to anybody. A third party named Sundara Row has sent me a notice that the amount is due to him. After making these statements, the letter goes on to say "The position of affairs is this. Therefore you are informed that you must send me the amount of subscription and I cannot give you credit for anything." The question now is whether these statements amount to an acknowledgment of liability. Mr. Sivarama Menon did not seriously contest the proposition, that an acknowledgment may be implied as well as express. The judgment of the Judicial Committee in *Sukhamoni Chowdharani* v. *Khan Chander Roy* [1], says, that we can spell out such an acknowledgment provided the liability is shown to be subsisting. There is also a decision of the Allahabad High Court in *Medh Raj* v. *Mathura Das* [2] where the learned Judges point out that a liberal construction should be placed upon documents purporting to be acknowledgments. My construction of Exhibit B is, that the writer acknowledged that the amount mentioned in the assignment bond is due and owing, but that he is unable to pay because no assignment deed was shown to him and also because there were counter-claimants who claimed the amount for themselves. In my opinion Exhibit B does contain an acknowledgment of liability.

The learned Vakil for the counter-petitioner has drawn my attention to several authorities of this Court, but as I read them,

1. (1898) I. L. R. 25 C. 844. 2. (1913) I. L. R. 35 A. 437.

Subba Rao v. Parasurama Patter.

they do not affect the present question. In *Venkataramanayya* v. *Srinivasa Rau*[1] a debtor wrote to say that he had a mulgeni right, and it was sought to infer from that, that a general tenancy was acknowledged, and that therefore a chalgeni tenancy could be implied, though there was certainly no acknowledgment of the particular right claimed by the creditor. In *Periyavenkan Udaya Thevar* v. *Subramanian Chetti*[2] there was no acknowledgment of any subsisting liability. In *Andiappa Chetti* v. *Alasinga Naidu*[3] the debtor wanted to look into the accounts and then say whether anything was due. These and the other authorities quoted do not help me in coming to a conclusion one way or the other. As I said before, *Sukhamoni Chowdhrani* v. *Isan Chunder Roy*[4] is the only case which comes near the present one, and in that case the Judicial Committee implied an acknowledgment from the language used. In my opinion, Exhibit B. does impliedly say that the debt is due but that the defendant is unable to pay it because of the circumstances mentioned by him in that letter. In this view I think I must reverse the decision of the Subordinate Judge and direct him to dispose of the case on the merits. Costs to abide the result.

N. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KUMARASWAMI SASTRI.

Mylappa Chettiar and another ... *Appellants (Plaintiffs 1 and 2.)*

*v.*

The British India Steam Navigation Company Ltd., and others. *Respondents (Defendants 1 and 2 and Plaintiffs 3, 4 and 5.)*

Mylappa Chettiar v. The British India Steam Navigation Company Ltd.

*Limitation Act, Art. 31—Continuous carriage of goods—Claim for Compensation for short delivery: Carrier—Landing agents—Bill of lading—Claim for short delivery to be made at a certain place within a month—Reasonable condition....*

Plaintiff was the consignee of certain timber through the first defendant, a firm of carriers by sea. The material portion of the bill of lading was as follows: The Company (first defendant) is to have the option of delivering the goods or any part thereof, into receiving ship, or landing them at the risk and expense of the shipper or consignee as per charges specified.........and is also to be at liberty until

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* A. S. No. 352 of 1916. 21st December 1917.

1. (1882) I. L. R. 6 M. 182.
2. (1896) I. L. R. 20 M. 289.
3. (1911) I. L. R. 36 M. 68.
4. (1898) I. L. R. 25 C 844.

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delivery to store the goods or part thereof in receiving ships, godown etc., the usual charges wherefor being payable by the consignee or shipper .....In all cases and circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk of the shipper or consignee " The second defendant was a firm, which had a monopoly of landing all the goods from the ships of the first defendant, but on receipt of separate charges from the consignee. In a suit by the plaintiff for compensation for that delivery, against both the defendants,

*Held*, (1) that there was privity of Contract between the consignee and the landing agents, the 2nd defendant; (2) that the case being one of continuous carriage of goods, the second defendant was a carrier though not a common carrier within the meaning of the Carriers Act of 1865; and (3) that the suit against both the defendants was governed by Art. 31 of the Limitation Act

*Venkata Subba Rao* v. *Asialia Steam Navigation Co.* [1] followed.

*Per Chief Justice*—A stipulation by a Steamship Company carrying on business as carriers, that they would not be answerable for short delivery unless they were appraised of the claim at a specified place and within a month of the delivery, is not unreasonable. But a claim made on the landing agents of the Steamship company who were employed only to land goods from the steamers and to take them to the godown, is not a sufficient compliance with the condition. *B. I. S. N. Co.* v. *Hajee Mahomed Esack and Co* [2] followed.

Appeal against the decree of the court of the Subordinate Judge of Negapatam in O. S. No. 55 of 1914.

The facts are stated in the judgment of Kumaraswami Sastri, J.

*T. R. Venkatarama Sastri* for Appellants.

*C. V. Ananthakrishna Aiyar, N. M. Malim Sahib* and *T. S. Ramaswami Aiyar* for Respondents.

The Court delivered the following

Wallis, C. J.

**Judgments**:—*The Chief Justice*:—A case somewhat similar to this came before the Courts in the *British India Steam Navigation Company* v. *Hajee Muhamed Esack and Company* [2], where it was held that the stipulation for a claim for short delivery being made on the ship-owner at Calcutta within a month was not unreasonable. This appears to be a sufficient answer to the claim against the British India Steam Navigation Company.

As regards the Madura Company, the second defendant, who was the landing agent, *Sir Charles Turner, C.J.* and *Innes, J.*, observe in the course of their judgment, as regards Ramanujulu and Sons who were in the same position as the Madura Company here, that "they were the agents of the appellants (the British India Company) to retain the goods, receive freight and give delivery; they were also the agents of the respondents (the consignees) to land

1. (1915) I. L. R. 39 M. 1=29 M. L. J. 342. 2. (1881) I. L. R. 3 M. 107.

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Wallis, C J.

the goods, but they were not the agents of the appellants to receive claims for compensation for the non-delivery of goods."

This passage recognises, I think correctly, the existence of a contractual relation between the landing agents and the consignees who paid them for their services. This appears to me to be one of those cases in which privity of contract is readily inferred from the well-known course of business according to which the landing agents are paid by the consignees and from the necessities of the case. Compare the cases referred to by my learned brother, in the recent Full Bench case, *Venkatasubba Row* v. *The Asiatic Steam Navigation Co., Calcutta* [1] and also the cases as regards carriage of goods over railways having continuous lines. *Gill* v. *Manchester, Sheffield* and *Lincolnshire Railway Co.*, [2]; *The Great Indian Peninsular Railway Co.* v. *Radhakisan Khusaldas* [3].

The proper inference appears to be that as in these cases the final stage of performance including carriage from the ship's side, which at Negapatam is a matter of some miles, and delivery, is performed by the 2nd denfendant. The suit as against the 1st defendant is barred under Article 31 according to the Full Bench ruling in *Venkatasubba Row* v. *The Asiatic Steam Navigation Co., Calcutta* [1] and I see no reason why the second defendant should not also be considered a carrier for the purposes of the article. It would be anomalous if a different article were applicable to the ship-owner and to the landing agent in respect of what are successive stages in the performance of one transaction—the carriage of the goods and delivery to the consignees. The appeal is dismissed with costs of respondents 1 and 2.

Kumaraswami Sastri, J.

*Kumaraswami Sastri, J.*—The plaintiff who was the consignee of certain timber consigned from Rangoon through the British Steam Navigation Company under the bills of lading setting forth the terms and conditions under which the British Steam Navigation Company undertook to carry the goods sued to recover Rs.2417-12-0 alleged to be due in respect of timber consigned but not delivered. The second defendant which is a firm engaged *inter alia* in landing goods from the Steamers of the British India Steam Navigation Company is sought to be made liable as they are landing agents at Negapatam in respect of all goods that arrive at the port

1. (1916) I. L. R. 39 M. 1=23 M. L. J. 342. 2. (1873) L. R. 8 Q. B. 186.
3. (1881) I. L. R. 5 B. 371.

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in vessels belonging to the British India Steam Navigation Company and levy and receive from plaintiff separate charges for their undertaking to land and deliver goods.

Various defences were raised but it is only necessary to consider the grounds on which the Subordinate Judge dismissed the suit namely, the question of limitation, so far as the 1st defendant was concerned and want of privity of contract as regards the 2nd defendant.

The bill of lading provides that "the company is to have the option of delivering the goods or any part thereof, into receiving ship, or landing them at the risk and expense of the shipper or consignee, as per scale of charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any part thereof, in receiving ship, godown or upon any wharf, the usual charges wherefor being payable by the shipper or consignee. * * * In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

It seems to me that the bill of lading provides that goods are to be conveyed from Burmah and landed at Negapatam by two agencies, one carrying the goods up to the port and the other from the ship's tackle to the godowns on shore and that the agreement limits the liability of the company to the period when the goods pass from the ship to the landing agent.

Mr. M'Conchy of the second defendant's firm who is the only witness called in the case, deposes that the 2nd defendant collects landing charges from merchants to whom goods are consigned through the 1st defendant Company which has nothing to do with the 2nd defendant's charges though the charges are subject to the 1st defendant's sanction. He states that the 2nd defendant Company owns a number of boats and that it is bound to unload goods from all the steamers of the 1st defendant Company and has the option of refusing to unload goods of others. He also states that merchants cannot engage the services of any other boat-agency to land goods from the 1st defendant's steamers.

The case is therefore one of continuous carriage of goods, the 1st defendant company making arrangements for the carriage though limiting its own liability to one stage of the transit.

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There can be little doubt that the 2nd defendant company, are carriers though not common carriers within the meaning of the Carriers Act of 1865. The word "carrier" in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire (Wharton Law Lexicon) and the second defendant falls within the definition.

I do not think that the 2nd defendant company can, on the facts proved in this case, escape liability on the ground of any want of privity between itself and the plaintiff.

In case of continuous carriers the authorities establish (1) that when the goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is in the absence of any contract limiting his liability to his own transport system liable for the loss or destruction on portions beyond his own system or in consequence of acts or default of persons other than his own servants. *Muschamp* v. *Lancestor &c. Junction Railway Company* [1], *Bristol and Exeter Railway Company* v. *Collins* [2], *Foulks* v. *Metropolitan District Railway Company* [3], *Aldridge* v. *G. W. Ry Company* [4]; (2) that in the absence of a contract to the contrary the consignor could not hold the company with whom he did not contract, liable for damages when all that could be complained of was non-feasance though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another, *Foulks* v. *Metropolitan Dist. Ry. Co* [3]; (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both companies either company may be sued on at the option of the consignor; *Gill* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, [5], *The Great Indian Peninsular Railway Co.*, v. *B. Radhakishan Khusaldas* [6].

If, however, the second defendant company are carriers and I think they are, it is clear that article 31 of the Limitation Act would apply equally to them. It is not necessary for the purposes of article 31 that they should be common carriers.

1. (1841) 8 M. and W 421.
2. (1859) 7 H. L. C. 194.
3. (1880) 5 C. P. D. 157.
4. (1864) 15 C. B. N. S. 582.
5. (1173) L. R. 8 Q. B. 186.
6. (1881) I. L R. 5 B. 371.

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Kumaraswami Sastri, J.

Whatever doubt may have existed as to the applicability of Art. 31 in cases of failure to deliver goods where the action was laid *ex contractu* the matter has been set at rest by the Full Bench decision of this Court in *Venkatasubba Row* v. *The Asiatic Steam Navigation Co., Calcutta* [1]. It is therefore unnecessary to refer to the various conflicting prior decisions on the point referred to by Mr. Venkatarama Sastri.

It was admitted before the Subordinate Judge that if Art. 31 applies the suit is barred by limitation as the claim arose more than a year before suit. There is nothing in the records to show that there was any acknowledgment of liability so as to take the case out of the statute of limitation.

I agree with the Chief Justice that the suit is barred and dismiss the appeal with costs of Respondents 1 and 2.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SESHAGIRI AIYAR.

Godavarty Sundaramma ... *Appellant* * *(Plaintiff).*

*v.*

Godavarty Mangamma ... *Respondent (1st defendant).*

Godavarty Sundaramma v. Godavarty Mangamma.

*Court-Fees Act (VII of 1870) S. 7 (V) (b) and (d)—Ryotwari land—Suit for possession of a plot of land forming a portion of a survey number but not constituting a definite share thereof nor separately assessed as such—Market value.*

In a suit to recover possession of a specific plot of land forming part of a distinct revenue-paying area but not constituting a definite share thereof nor separately assessed to revenue by itself, *held* that court-fee should be paid on the market value of the land in suit under S. 7 (v) (d) of the Court Fees Act.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Coutts Trotter in C. R. P. No. 663 of 1915 praying the High Court to revise the order dated 27th April 1915 of the Court of the Additional District Munsif of Tenali in O. S. No. 43 of 1915.

The judgment in C. R. P. 663 of 15 was as follows:

Coutts Trotter.

*Coutts Trotter, J.*—This case raises the question of the construction of a section of the Court Fees Act, VII of 1870, and the way that the matter arises is this. A suit was brought for the recovery of land which was a definite plot forming part of Survey No. 304 and was in fact 3 acres 59 cents in extent. That Survey Number as a whole consists of 4 acres 42 cents, out of which 83 cents had been

* L. P. A. No. 97 of 1916. 15th November, 1916.

1. (1915) I. L. R. 39 M. 1.

Godavarty Sundra amma v. Godavarty Mangamma.

Coutts Trotter, J.

sold away before, leaving a residue of 3 acres 59 cents which was what the plaintiff was suing for. The point is this, that according to the construction of the Court Fees Act will the question be determined as to what Court has jurisdiction, because it is not contended that on the method of valuation of the land, the jurisdiction of the Court to try will depend. According to the plaintiff the proper sub-section to apply is sub-section 5 (b) of S. 7 of the Act which would be to apply a system of multiplying the revenue payable in order to arrive at the calculation provided by the Act for fixing the value of the suit. According to the defendant it is sub-section 5 (d) of the section which really governs the matter, in which case the market value of the land has to be ascertained. According to the plaintiff as I say S. 5 (b) applies and the words then are these :— "Where the land forms an entire estate, "—that is not this case—" or a definite share of an estate, paying an annual revenue to Government, or forms part of such estate and is recorded as aforesaid", which by reference to sub-clause (a) means "is recorded in the Collector's Register as separately assessed with such revenue." It is not disputed that what appears in the Collecter's book is this, a description of the whole area covered by a particular *patta*, an enumeration of its extent and a figure representing the total revenue payable in respect of that *patta*. Then there follow particulars which show the rate charged per acre. I am asked to say by the plaintiff that the true construction of this Act is that because you can by a mathematical calculation arrive at what fraction of the whole *patta* any piece of land is, therefore any and every bit of land that you take within the whole *patta* must be considered to be separately assessed to revenue. That seems to me to be a proposition which is utterly incapable of being supported, if for no other reason because it gives no meaning whatever to the words "separately assessed." It is all assessed: the only thing is whether it is separately assessed as distinct from something which is assessed as part of a whole, and that is what I find to be the meaning of the words. Within the meaning of these words therefore the land in question in this suit cannot fall.

Then it is said that even if this is not a part of an estate separately assessed to revenue, nevertheless it may be regarded as "a definite share of an estate." Once more I make the same criticism on that construction as upon the other. It entirely ignores the word 'definite,' because every share in an estate is in some sense a definite share, and I have no doubt that what is meant by the words "definite share' is an undivided tangible fraction of an estate as distinct from a defined demarcated plot which has been taken out of an estate. Supposing for insance I sell Brownfield plot out of Whiteacre estate, that would be in my opinion not a definite share of an

Godavarty Sundaramma v. Godavarty Mangamma.

Coutts Trotter, J.

estate within the meaning of this enactment. But if I sell a fraction of my Blackacre estate and it has got to be divided up among different kinds of land, that I think is a definite share of an estate within the meaning of the section. I observe the same view was taken by a learned Judge of the Allahabad High Court in *Reference under the Court Fees Act*, 1870, S. 5 (1) [1]. I am conscious of the extreme inconvenience of this decision but I see no possible escape from that construction of the Act. It leads no doubt to this absurdity in some cases. For instance you might have a case where if you sue for the recovery of a whole plot, if it falls under sub-section 5 (b), taking five times the revenue would result in a lower value than if you sue for a portion of the land which according to this view has to be taken at the market value. Probably in the present case it may be that a suit for the recovery of the whole Survey Number will have to go to the District Munsif, whereas the suit for a portion of it may have to go to the Subordinate Judge's Court. The result is doubtless regrettable and I tried very hard to avoid it; it seems to me that the view of the person who drafted the section in fact was that wherever you can calculate with reasonable certainty the amount of revenue payable on a plot you should take 5 or 10 times the revenue, and in default of any possibility of measuring the revenue then you must in the last resort have recourse to the inconvenient and cumbersome method of valuation by the market value. That is a logical and intelligible method and must have been the intention of the framer of the statute, but if so, he has fallen very short of his object; because though, as I say, the construction that I have adopted is probably not what was intended, it is the only possible construction on the wording of the statute.

The result is that this petition is allowed and I declare that the subject-matter of this suit must be valued according to its market value and the case must be remanded to the lower Court to ascertain the market value and determine the question of jurisdiction in accordance with the value found. The petitioner's costs in this Court will be paid by the respondent.

On appeal under Cl. 15 of the Letters Patent.

*P. Narayanamurthy* for Appellant.

*A. Krishnaswami Aiyar* for Respondent.

The court after calling for a report from the Lower Court delivered the following

**Judgment** :—The report of the District Munsif now received places it beyond doubt that the portion of Survey No. 304, which is part of the subject-matter of the suit, has not been subdivided and separately assessed to land revenue.

1. (1894) I. L. R. 16 A. 493.

It cannot therefore be valued under clause (b) of Sec. 7 (v) of the Court Fees Act. The order of the learned Judge is clearly right.

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The appeal must be dismissed with costs.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE NAPIER.

Srikakolapu Venkataraju ... *Appellant* * (*Defendant*).

*v.*

Gudivada Ramanujam ... *Respondent* (*Plaintiff*).

Srikakolapu Venkataraju v. Gudivada Ramanujam.

*Contract Act, Ss.* 30 *and* 65—*Wagering contract—Money deposited as security for performance of—Right to recover.*

Money deposited by the plaintiff with the defendant as security for the performance of his part of a wagering contract is recoverable by the former, not under the provisions of S. 65 of the Contract Act, but by virtue of the general principle of law that a person whose hands have not been tainted by corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another.

*Ledu Coachman* v. *Hiralal* [1], *Gulab Chand* v. *Lalubhai* [2], *Haribansraju* v. *Ratanji* [3], referred to.

S. 65 of the Contract Act has no application to a case where the contract is *ab initio* void. *Ledu Coachman* v. *Hiralal* [1], *Parshotam Veribhai* v. *Chatrasanghi* [4], *Srinivasa Iyer* v. *Sesha Iyer* [5], referred to.

Second appeal against the decree of the Court of the Subordinate Judge at Cocanada in A. S. No. 129 of 1914 preferred against the decree of the Court of the District Munsiff at Cocanada in O. S. No. 338 of 1912.

*T. R. Ramachandra Aiyar* for Appellant.

*B. Narasimha Rao* for Respondent.

The Court delivered the following

**Judgment**:—We accept the finding that the contract was a wagering one. The further question is whether the money deposited by the plaintiff with the defendant as the security for the performance of his part of the contract is recoverable. There is no question of limitation.

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* S. A. No. 667 of 1917. 5th December 1917.

1. (1915) I. L. R. 43 Cal. 115.
2. (1909) I. L. R. 33 Bom. 411.
3. (1913) I. L. R. 38 Bom. 249.
4. (1916) I. L. R. 41 Bom. 546.
5. (1917) 34 M. L. J. 282.

The Lower Courts held that S. 65 of the Contract Act was applicable to the transaction. We are unable to agree with them. S. 30 makes a wagering contract void *ab initio* and to such a class of contracts, S. 65 has no application. In *Ledu Coachman* v. *Hiralal* [1] this view was taken. Despite the inclination of the learned Judges of the Bombay High Court in the earlier cases to apply S. 65 to such contracts the later view is in agreement with the Calcutta view. See *Parshotam Veribhai* v. *Chatrasanghji* [2]. In this Court Oldfield and Bakewell, JJ., held in *Srinivasa Aiyar* v. *Sesha Aiyar* [3] that S. 65 does not cover moneys paid under a marriage brokerage contract. That principle is applicable to the present case. The question still remains whether the plaintiff is entitled to sue for the recovery of the money paid by him in furtherance of the contract of wager. We are clear that the direct prohibition contained in S. 30 does not prevent such a claim. This is not a suit to recover any money, due on any wager ", nor is the suit to recover money "entrusted to any person to abide the result of any game or other uncertain event on which any wager is made." In our opinion this latter clause applies only to cases of moneys left with stake-holders. It may be as Mr. Ramachandra Aiyar suggested that the money is sometimes left with one of the parties to the contract on account of his solvency or respectability. But the position he would occupy with reference to the money so paid will be that of a stake-holder. The entrustment referred to in the section can have no meaning when the money is left as a security for the due performance of the contract. We therefore hold that S. 30 does not prohibit the maintainability of such a suit.

This takes us to the general right of parties whose moneys are in the hands of another without the latter having any right to retain them. Ordinarily the person who paid the money is entitled to claim it back. But there may be such a conduct on the part of the person paying it as to disentitle him from recovering it; one instance is that of being a party to the perpetrated fraud. Another instance is where moral turpitude is attributable to the person who paid the money. The decision in *Ledu Coachman* v. *Hiralal* [1] is an illustration of the latter class of cases. The observations of the learned Judges in that case show that if there is no moral delinquency the plaintiff can sue to recover. *Gulab Chand* v. *Lalu-*

1. (1916) I. L. R. 43 Cal. 115. 2. (1916) I. L. R. 41 Bom. 546,
3. (1917) 34 M. L. J. 282.

*bhai* [1], and *Haribhansraju* v *Ratanji* [2], lay down the same principle.

Srikakolapu Venkataraju v. Gudivada Ramanujam.

These decisions derive support from a catena of English decisions which have held that even against a stake-holder, a suit for money will lie if he had not parted with the stake-money and the claim is founded not on the result of the wager. It is an *a fortiori* conclusion from these authorities that where money is not left with a stake-holder nor entrusted on condition that its disposal is to be determined by the result of the uncertain event, the money deposited as security must be returned. *Hampden* v. *Walsh* [3], *O'Sullivan* v. *Thomas* [4] and *Burge* v. *Ashley Smith Ltd.* [5] enunciate the proposition we have referred to.

In our opinion the general principle that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he left with another is applicable to the present case. We uphold the judgment of the Courts below on this ground and dismiss the second appeal with costs.

The memorandum of objections is also dismissed with costs.

A. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, *Chief Justice* AND MR. JUSTICE SPENCER.

The Midnapore Zemindari Company, Limited, at No. 8, Clive Row, Calcutta, through its duly authorized Manager, P. V. Subramania Ayyar. — *Appellant* * *(1st defendant.)*

*v.*

Malayandi Appayasami Naicker and others ... *Respondents (1st plaintiff and 2nd defendant.)*

The Midnapore Zemindari Company Limited v. Malayandi Appayasami Naicker

*Unsettled palayam—Service tenure—Alienability and liability for debts—Abolition of Military and Police services—Omission to issue sanad under Regulation 25 of 1802—Restraint on alienation, cessation of—Enfranchisement from service if validates prior alienations—Spes successionis—Mortgage and sale of, not operative*

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* A. S. No. 282 of 1916. 18th February, 1918.

1. (1909) I. L. R. 33 Bom. 411.
2. (1913) I. L. R. 38 Bom. 249.
3. (1876) 1 Q. B. D. 189 at 196.
4. (1895) 1 Q. B. D. 698.
5. (1900) 1 Q. B. 744.

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*on mortgagor's interest when it falls into possession—Execution sale supportable on foot of personal liability clause in decree—Possession if adverse to the estate so as to bar successors—Limitation Act, Arts.* 120, 142 *and* 144.

In India, apart from statute, lands held on service tenure are inalienable beyond the life-time of the holder. Where however, an estate is freed from its connection with a public office and the services are abolished, it is subject to the same incidents of ownership and devolution as ordinary property. *Papaya* v. *Ramana* [1], *Pakkiam Pillay* v. *Seetharama Vadhyar* [2], *Radhabai and Ramachandra Konher* v. *Anantrao Bhagavant Deshpandhi* [3] Referred to.

Where lands held on service-tenure have been alienated, the subsequent enfranchisement of the lands from service will not validate the alienation so as to give an absolute interest to the alienee. *Sannamma* v. *Radhabayi* [4], *Padapa* v. *Swamirao* [5] Relied on.

An unsettled palayam held originally on condition of rendering military and police services, ceases to be inalienable on the abolition of such services by the British Government, notwithstanding the omission of the Government to issue a sanad under Regulation 25 of 1802 finally settling the peishcush payable by the holder of the estate. *Collector of Trichinopoly* v. *Lekkamani* [6], *Oolagappa Chetty* v. *Arbuthnot* [7] Relied on.

Where a person having merely a *spes successionis* in respect of a particular property purports to transfer it such transfer does not operate on the interest of the transferor if and when he actually succeeds to the property. *Ramasami Naick* v. *Ramasami Chetti* [8], followed.

*Obiter* : Assuming that the estate of a poligar is one for life, the poligar for the time being would ordinarily represent the estate. If, therefore, the poligar for the time being is dispossessed and he fails to sue for possession within 12 years of the dispossession, the person in possession gets an absolute title to the estate and the successor of the poligar has not got a fresh starting point from the date of his succession unless he shows that his predecessor had effectually debarred himself from suing and there was no one else who could have sued successfully for possession. *Murray* v. *East India Company* [9], *Musuras Bey* v. *Gadban* [10], *Meygappa Chetty* v. *Subramanian Chetty* [11] Referred to.

Appeal against the decree of the District Court of Madura in Original Suit No. 5 of 1915.

*Eardley Norton* (*T. R. Venkatarama Sastri and S. Varadachariar with him*) for appellant.

The pauliem has been held to be inalienable on the ground that in its origin it was impressed with military and police services and those incidents of the tenure continued up to 1900 the date of the Court sale. The plea that the pauliem is inalienable by the custom of the family, though raised, was abandoned. There is no evidence to show that this pauliem when it was

1. (1883) I. L. R. 7 M. 85.
2. (1908) 14 M. L. J. 134.
3. (1885) I. L. R. 9 B. 198.
4. (1917) 34 M. L. J. 17.
5. (1900) I. L. R. 24 B. 556.
6. (1874) L. R. 1 I. A. 283.
7. L. R. 1 I. A. 268.
8. (1906) I. L. R. 30 M. 255, 262.
9. 5 B. and A. 204.
10. (1894) 2 Q. B. 352.
11. (1916) L. R. 43 I. A. 113, 120.

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granted by the British in 1792 to the original poligar, was impressed with a military character. Even if it was, there is no rule that a pauliem held on condition of rendering military or police service, is in all cases necessarily inalienable. The incidents of military and police services, even if they originally existed, were abolished by the disarmament proclamations Ex. XXVI and XXVI (a) and by the passing of the permanent settlement Regn. XXV of 1802. See also the Fifth Report (Higginbotham's Edn). pp. 27, 28, 31 and 46. This policy was extended to the poligars also. Fifth Report, pp, 92, 94, 95 and 97. The peishcush was fixed permanently in 1804 under Ex. E 3 the annual sannad. The amount was calculated on the method usually adopted for the permanent settlement and the rate has never varied since nor has there been any further issue of annual muchilikas. The omission to issue a sanad under Regn. XXV of 1802 is not conclusive, for the sannad is only *evidence* of the enfranchisement from service and the fixing of the peishcush, *Lekkamani* v. *Puchayya Naickar* [1]. The omission to issue a sanad does not affect the abolition of the military service. The issue of a sanad is not essential to enfranchisement from service. The enfranchisement from service was effected independently of the sannad by virtue of the proclamation and Regn. XXV of 1802.

[*Chief Justice.*—It will be an unsettled palayam, till the issue of a sannad.]

Even so, it is heritable, alienable and liable for debts. See *The Marangapuri Case* [2] and *the Gantamanaickanar Case* [3] on appeal from *Lekkamani* v. *Puchaya Naikar* [1] and *D. Arbuthnott* v. *Oolaguppa Chetty* [4] respectively. In the latter case the decision that an unsettled pauliem is liable for the debts of a deceased holder in the hands of his successor, necessarily involves the position that an unsettled palayam is alienable In fact the only difference between a Zemindari and an unsettled palayam lies in the liability of the latter to pay additional jumma if demanded by Government.

Reference was then made to the evidence relating to the military services rendered by the poligar in former times and to Nelson's Madura Manual, Part III, pp. 97 to 99, 287 to 289 and 292 and Part IV, p. 31 ; Madura Dt. Gazetteer, Vol. I, p. 71;

1. (1870) 6 M. H. C. R. 208, 226.
2. (1894) L. R. 1 I. A. 282 at 313
3. (1874) L. R. 1 I. A. 315.
4. (1870) 5 M. H. C. R. 303.

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Atchieson's Treaties, etc., Vol. 4, p. 460. There is no evidence that any military service worth the name was rendered by the poligar of Kannivadi after the British occupation, much less after the proclamations and the Permanent Settlement Regn. XXV of 1802. The heavy peishcush fixed by Ex. E 3, the sannad, clearly indicates that the Government never intended to reserve any services. As regards the abolition of the police services reference was made to the Fifth Report, pp 101, 102. Regn. XI of 1816, Ss. 38 and 39, Act 24 of 1859 and Madras Act III of 1895. The services had become obsolete.

[*Chief Justice*:—Referred to S. 5 of Regn. XXV 1802.]

The services relied upon by the Court below are services which every citizen had to render to the State under the criminal Procedure Code and are not connected with the tenure of the land.

Plaintiff now sues as the holder of an office to recover the lands attached thereto. On 1905 the office was abolished by the issue of a sannad under Regn. XXV of 1802 for this palayam. Since the post has been abolished plaintiff cannot sue as office-holder. *Radhabhai and Ramachandra Konher* v. *Anantrav Bhagwant Desphande* [1].

[*Chief Justice*.—If there is to be a restriction on alienation of lands attached to a public office, it must be an absolute restriction and not merely against alienations beyond his life-time. Public Policy requires that the lands should always be with the holder of the office for supplying the service.]

The decisions have recognised a qualified power of alienation for the life of the holder. As a son suing to set aside the alienations of his father, plaintiff cannot succeed as the debts have been held to be both antecedent and binding.

Plaintiff's suit is barred by limitation. Limitation started at least in 1900, the date when the plaintiff's father was dispossessed. Plaintiff's father's omission to sue for 12 years after 1900, bars plaintiff. Even assuming that a poligar is a life-tenant, he represents the estate and his omission to sue bars the successors.

[*Chief Justice* :—Plaintiff's father was a party to the mortgage and he could not have objected to the sale.]

At the time of the mortgage he had only a *spes successiones* and his joining the mortgage does not preclude him from impeaching it. *Ramasami Naik* v. *Ramasami Chetti* [2].

1. (1885) I L. R. 9 B. 198, 202, 212 and 213. 2. (1906) I. L. R. 30 M. 255.

[Reference was also made to *Sham Sunder Lal* v. *Achan Kunwar* [1] and *Venkataramayya* v. *Dejappa Kundo* [2]]

*The Hon. The Advocate-General* (*A. Krishnaswami Iyer* with him) for the Respondents.

All service-tenures are inalienable beyond the life-time of the incumbent under the Common Law of India apart from any regulation or statute. This is especially so where the services are public.

[*Chief Justice*:—How do you explain the fact that the incumbent can alienate for his life.]

The servant has a right to his own income and therefore he can alienate. But the successor also is entitled to protection and therefore he can avoid.

[*Chief Justice*;—The restriction is for the up-keep of the service and not of the successor.]

In the case of a military and police tenure, the rule as to inalienability holds good, till the tenure is formally commuted and it is immaterial that the services have become obsolete. This pauliem was held on a military and police tenure at all material times. Before the English conquest the pauliem was held as a military tenure and it continued as such, thereafter the poligar was bound to maintain, and when required to furnish a fixed number of troops to serve with the King's army. *The Ramnad Case* [3], Nelson's Madura Manual, Part III, pp. 98, 99, 157; Wilson's Glossary, p. 391; *The Naragunty Case* [4], *The Polarangapuri Case* [5], *Veera Chinnammal* v. *Akkula Ammal* [6]. Fifth Report, p. 88, Baden Powell, Vol. III, p. 133; *Lekkamani* v. *Puchaya Naikar* [7], Aitchieson's Treaties, Vol. 8, pp. 47, 49 and art. 6 of the Treaty; *Lakshmipati* v. *Kandasami* [8], *Vidyapurna Tirthaswami* v. *Vidya Nidhi Tirthaswami* [9]. The abolition of the service or the enhancement of the peishcush does not affect impartibility or the limited power of alienation either. The *Ramnad Case* [3]. Impartibility which is an incident of the military tenure survived the abolition of the military services. So also inalienability

1. (1888) I. L. R. 21 A. 71.
2. (1917) M. W. N. 679, 680.
3. (1893) I. L. R. 24 M. 613, 618.
4. (1861) 9 M. I. A. 66.
5. (1874) L. R. 1 I. A. 3268 at 14.
6. (1890) 1 M. L. J. 341.
7. (1871) 6 M. H. C. R. 220, 221.
8. (1892) I. L. R. 16 M. 54, 56, 57.
9. (1903) I. L. R. 27 M. 435, 459.

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beyond the life-time of the holder. The palayam tenure continued till the issue of a Zamindari sanad. There was merely a cessation of the military service after the disarming proclamation. The proclamation contemplated an abolition of military service in future by the issue of a Zamindari sanad and till then the military tenure continued to subsist. *The Udayarpalayam case* [1]. Apart from the proclamation the Government had done nothing to release the military service. *Muttu Vadugunatha Thevar* v. *Dora Singha Thevar* [2]. As a matter of fact military service was rendered till 1804. Nelson's Madura manual, Part III pp. 99, 119, 125, 139, 157, 169-170, 287-290, 291, 292; Part IV, pp. 9 and 20. There is nothing to show that when the annual jamma was fixed by E. 3 the military services were commuted. The palayam was not converted into a Zemindari and there was no release of the obligation to render service. Ramnad Manual, Book IV, pp. 27, 30, 33, 52, 53 and 57. Fifth Report, p. 368. Reference was then made to the evidence in the case showing that military services were exacted even after the Permanent Settlement Regulation. Mr. Hurdis did not make any report about the 14 palayams including Kannivadi, as he did in the case of the other Dindigal pauliems for which a zemindari sanad was issued. The peishcush fixed under E. 3 was a tentative arrangement intended to last for that year. Nelson's Madura Manual, Part IV, pp. 20, 21. Till the peishcush is fixed once for all and a zemindari sanad issued, the old tenure continues. *The Udayarpalayam Case* [1]. If the service was annexed to the grant at its inception, the cessation of service does not remove the restriction on alienation. *Radhabai and Ramachandra Konher* v. *Anantrao Bhagvant Desphande* [3], proceeded on a misapprehension as to the nature of the settlement. Reference was made to *Swami Rao* v. *Padapa Bin Bhujangrav* [4], *Appaji Bapuji* v. *Keshav Shamrav* [5], *Bhau Bin Pommanna* v. *Ramachandrav Bin Mahipatrao*, [6] *Padapa* v. *Swamirao Srinivas* [7] as questioning the correctness of the decision in *Radhabai and Ramachandra Konher* v. *Anantrav Bhagvant Despande* [3], Military tenure imports inalienability, apart from any statute or regulation. Mayne's Hindu Law, Ss. 338, 401. This is so with all

1. (1901) I.L.R. 24 M. 562, 598, 604.
2. (1881) I L. R. 3 M. 290, 304, 306.
3. (1885) I. L.R. 9 B. 198.
4. (1892) I. L. R 28 B. 22, 31, 34.
5. (1890) I. L. R. 15 B. 13, 22.
6. (1895) I. L. R. 20 B. 423.
7. (1900) I. L. R. 24 B. 556 (P.C.)

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service tenures. *Muppidi Papayya* v. *Ramana* [1], *Pakkiam Pillai* v. *Seetharama Vadhiyar* [2], *Minakshisundaram Pillai* v. *Chockalinga Royar* [3], *Chandrakantam* v. *Subbarayudu* [4], *Kammara Peda Subbayya* v. *Kararha Channapa* [5], *Nilmoni Singh Deo* v. *Bakranath Singh* [6], *Raja Lelanund Singh* v. *The Government of Bengal* [7], *Narain Mullick* v. *Badi Roy* [8], *Rani Keshabati Koeri* v. *Mohori Chandra* [9], *Durga Prasad Singh* v. *Braj Nath Bose* [10], *Moonshee Buzl Ruheem* v. *Sreenath Bose* [11], *Bukronath Singh* v. *Nilmoni Singh* [12], *Sartaj Kuari* v. *Deoraj Kuari* [13], *Beresford* v. *Ramamasubba* [14], *Sri Raja Rao Surya* v. *The Court of Wards* [15]. An estate granted for military and police services is both inalienable and impartible. Inalienability rests on the same footing as impartibility. But the cases in this Presidency having been decided after Regulation XXV of 1802 no question of inalienability could arise in the case of Zemindaris with permanent sanads. The question therefore arose mainly with reference to impartibility. The *palayam* tenure is different from *Zemindari* tenure and an unsettled palayam though hereditary is yet inalienable beyond the life-time of the holder. Even in *Radabhai and Ramachandra Konher* v. *Anantrav Bhagvant Deshpande* [16], West, J., observes that the tenure continues though the office becomes sinecure. The present case falls within that rule even if it is held that the services have become obsolete. *Alexander John Forbes* v. *Meer Mohammad Tuquee* [17]. Regulation XI of 1816 does not put an end to the kaval service. It imposed additional police duties on Zemindars.

[*Spencer, J.*, Regulation XXV of 1802 puts an end to the police service].

That is only in cases where the Regulation is applicable (*i.e.*,) in cases where a sanad has been issued. When the Regulation speaks of a "proprietor" it refers to a person becoming a proprietor by virtue of sanad under the Regulation. It has a technical meaning.

1 (1883) I L. R 7 M. 85
2. (1903) 14 M. L J. 134.
3. (1904) 15 M L J. 10.
4. (1914) M. W. N. 745
5. (1914) 28 M. L. J. 303,
6 (1882) I. L. R. 9 C 187, 190.
7. (1855) 6 M. I. A. 101, 125.
8. (1901) I. L. R. 29 C. 227.
9. (1912) 16 C. W. N. 802.
10. (1911) I. L. R. 39 C. 696.
11 (1866) 6 W. R. 178.
12. (1879) I. L. R. 5 C. 389, 408.
13. (1888) I. L. R. 10 A. 272
14. (1889) I.L R. 13 M. 197 at 205.
15. (1899) I. L. R. 22 M. 383.
16. (1885) I. L. R. 9 B. 198.
17. (1870) 13 M. I. A. 464, 465.

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[*The Chief Justice.*—Regn. XXV of 1802 was an exposition of the general policy which the Government wished to adopt in this Presidency. The issue of a sanad was merely an incident of that policy. The omission to issue a sanad in some cases does not show that the policy was to be different in such cases.]

S. 8 of Regulation XXV of 1802 speaks of transfers of *Zamindaris.* The distinction between Zemindars and poligars is kept in view. In cases where a Zemindari sanad was not issued, police services continued to exist even after Regulation XXV of 1802. *Narayana* v. *Chengalamma* [1], Reference was also made to *Muttu Vaduganatha Tevar* v. *Dora Singha* [2], *Secretary of State for India* v. *Maharaja of Venkatagiri* [3].

[*Chief Justice.*—The Privy Council say in *The Marangapuri Case* [4], that proprietary right exists irrespective of the grant of sanad.]

If proprietary right means ownership, then the Privy Council say that it might exist even in cases where no sanad had been granted, for the Regulation in that respect is declaratory.

[*Chief Justice.*—The question of inalienability was not raised in the Marangapuri case, though the Government was represented by the Collector. Marangapuri was one of the 72 palayams like Kannivadi.]

The conduct of the Government might be of importance when a question of resumption arises, but not in the present case. The whole argument for the Government in the Marangapuri case was based on the pre-amble to Regulation 31 of 1802 and there is nothing to show that the Privy Council laid down that Regulation XXV of 1802 applies to cases where no sanad has been issued. The clause for forfeiture in E. 3 the annual sanad issued to Kannivadi shows that the holding was conditional on the rendering of service.

[*Norton* observed that the Fifth Report Commissioners reported that the police services had been put an end to in 1812.]

[*Chief Justice.*—In 1866, the Government offered to issue a sanad to Kannivadi on the existing peishcush. If these valuable military and police services had been in existence, would the Government have made that offer ?]

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1. (1886) I. L. R. 10 M. 1.
2. (1880) I. L. R. 3 M. 307.
3. (1916) 31 M. L. J. 97, 113.
4. (1874) 1 I. A. 282, 312.

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As a matter of expediency the Government might not have enhanced the peishcush.

[*Chief Justice,*—We have to look to the conduct of Government for it is to them that the services are alleged to be due.]

If the alienation was void at its inception as being opposed to public policy, the subsequent issue of a sanad will not validate it. The observation of West, J., in *Radha Bhai and Ramachandra Konher* v. *Anantrav Bhagvant Deshpande* [1], is erroneous. See *Padapa* v. *Swamirao Shrinivas* [2], *Kalu Narayan* v. *Kulkarni Hanmappa* [3], *Ganga Bai* v. *Baswant* [4], *Sannamma* v. *Radhabhayi* [5].

The previous conduct of the family in recognising alienations is not of much value. The alienations were of very small extents and most of them were grants for pious purposes which a successor would not easily disturb. Reference was made to *Baboo Ganesh Dutt Singh* v. *Maharaja Moheshur Singh* [6], *Mahadevi* v. *Vikrama* [7], A. S. 121 of 1877; S. 12 of Regulation XXV of 1802.

The question of limitation arises only if it is held that the pauliem is not alienable at the will of the holder. The plaintiff's father was personally liable under the mortgage decree and the sale was in 1900 when plaintiff's father was the poligar. Therefore he could not have questioned the sale or sued for possession. When it was sought to make the decree absolute, he represented by his pleader that he had no objection. In these circumstances limitation starts for the plaintiff only on his succession. *Muthusamier* v. *Sree Sree Methanithi Swamier.* [8].

*Eardley Norton replied.*

The Court delivered the following

**Judgment**:—This is an appeal from the decree of the District Judge of Madura in a suit brought by the plaintiff as heir of the late Zemindar of Kannivadi to recover the Zemindari from the first defendant, the Midnapore Zemindari Company, and the 2nd defendant claiming under it. The defendant company acquired the zemindari for more than thirteen lakhs of Rupees from the

1. (1885) I. L. R. 9 B. 198, 215.
2. (1900) I. L. R. 24 B. 556.
3. (1879) I. L. R. 5 B. 435.
4. (1909) I. L. R. 34 B. 175.
5. (1917) 34 M. L. J. 17 (F.B.)
6. (1855) 6 M. I A. 164 at 192.
7. (1891) I. L. R. 14 M. 365.
8. (1913) I. L. R. 38 M. 356.

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Liquidator of the Commercial Bank of India, which in December 1895 had advanced money on a mortgage to which the plaintiff's grand-father, the then zemindar and his son, the plaintiff's father were parties, and had subsequently obtained a consent decree for sale, and brought the zemindari to sale and purchased it after the death of the plaintiff's grand-father and the succession of his father to the estate. At the date of the Court sale in 1900 the zemindari was an unsettled palayam, but in 1905 the Bank succeeded in obtaining a permanent sannad under Regulation XXV of 1802 at the same peishcush as had been paid without alteration for more than a hundred years.

The ground on which the plaintiff has succeeded in the lower Court in recovering the zemindari from the transferees of the auction purchaser is that at the dates of the mortgage and the mortgage decree and of the sale thereunder, which were prior to the issue of the permanent sannad of 1905, the zemindari was held on the tenure of rendering military and police service as well as of paying the peishcush demanded; and that in these circumstances it was inalienable by the plaintiff's grand-father and his father after him for more than the terms of their respective lives. These contentions the District Judge has accepted. At the hearing of the appeal the learned Advocate-General raised the further contention that the zemindari was made inalienable by the provisions of Regulation VI of 1831.

The appellants did not admit that such services, if they existed, would render the zemindari inalienable, and contended that, even if this were so, this defect in the Bank's title was cured by the grant of the sannad to them in 1905 which admittedly put an end to such services if they were then in existence, and rendered the zemindari freely alienable. Their main case, however, was that in 1895 the date of the mortgage to the Bank and afterwards the zemindari was not held on any conditions of military or police service. As regards military service they contended that, when after the cession of Dindigal to the Company by Tippoo in 1792, the then poligar who had been expelled by Tippoo for failure to pay the peishcush imposed upon him, was restored by the Company, the incident of military service was suppressed by the Company in accordance with its settled policy as a necessary preliminary to the introduction of settled government. As regards the police or kaval duties, they admitted that such duties were at

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first required of the palayagar by the annual sannads issued to him by the Collector of Dindigal, of which several from 1796 to 1804 have been exhibited, but they contended that in accordance with the provisions of S. 5 of Regulation XXV of 1802 and the policy declared therein this police or kaval service was abolished before 1812 and referred to the Fifth Report and Regulation XI of 1816. They contended that the peishcush was permanently settled at the beginning of the last century, and that the delay in issuing permanent sannads in the case of this and some other palayams was due to other causes and without any idea of claiming military and police services from them. As regards the alienability of such unsettled palayams, they relied upon the decision of the Judicial Committee in *The Gundamanaikanur case* [1], not only that such palayams were hereditary, but that debts incurred by the holder for the time being were binding on the palayam in the hands of his successors, which could not be the case if they were inalienable except for the lifetime of the holder for the time being. The present contention—they contended—was an after thought. The zamindari after being held under Government management was restored to the zamindar in 1843 on payment of a sum of money for arrears which he had to borrow. To discharge this and other indebtedness of his predecessors one of the zemindars in 1861 granted a thirty years lease of the zemindari which was in the nature of a usufructuary mortgage. His successor obtained from this Court a decree in the nature of a redemption decree, and recovered the zemindari by paying off the sum payable to the lessees under the decree in respect of advances made by him to discharge the indebtedness of the estate. The mortgage to the Commercial Bank in 1895 was in respect of the indebtedness incurred by the zemindar in redeeming the zemindari. That it was regarded as binding on the zemindari was shown from the fact that the next heir, the plaintiff's father, joined in the mortgage and consented to the decree for sale.

As regards the inalienability of lands held on service tenure it is held in India that, even apart from statute, they are inalienable beyond the lifetime of the holder, Mayne S. 338, *Papaya* v. *Ramana* [2], *Pakkiam Pillai* v. *Seetharama Vadhyar* [3], and we must

1. (1874) L. R. I. A. 282. 2. (1883) I. L. R. 7 Mad. 85.
3. (1903) 14 M. L. J. 134,

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so hold. The learned Advocate-General, also, relied upon the statutory prohibition against the alienation of service lands contained in Regulation VI of 1831, but as will be pointed out later, the general statutory prohibition was repealed before the date of the alienations now in question by Madras Act III of 1895, and the limited prohibition contained in that enactment does not affect the present case. The further contention that the subsequent enfranchisement of the land from service, as by the issue of the sannad of 1905 in this case, would validate alienations previously made is supported by certain observations of West, J., which appear to have been made *obiter* in *Radhabai and Ramachandra Konher* v. *Anantarao Bhagavant Deshpandi* [1], but is opposed to the recent decision of a Full Bench of this Court, *Sannamma* v. *Radhabhayi* [2], by which we are bound, and also to an express decision of the Privy Council in *Padapa* v. *Swamirao* [3], to which our attention was drawn by the learned Advocate-General. This contention of the appellant must therefore be rejected.

The further contention that, assuming the zemindari to have been held at first under the company on service tenure, the abolition of these services would render it alienable is supported by the judgment of West, J., in the case already referred to in which Sargent, C. J., and two other learned Judges of the Bombay Court concurred. The learned Judge observed in *Radhabhai Ramachandra Konher* v. *Ananta Rao Bhagwant* [1] (p. 212) " So long as lands are assigned by the Sovereign to the support of a public office, or the land-tax payable on land is remitted in consideration of services to be performed by a particular family or line of holders, the lands are, according to the principles of the Hindu Law and the customary law of the country, incapable of alienation or disposal, such as to divert them, or the proceeds of them, from the intended purpose—*Ravlojirav* v. *Balvantrav Venkatesh* [4]. This principle has been recognized in many decisions—*Mussamut Kustoora Koomaree* v. *Monohur Deo* [5], * * * *" " When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate, intact and unencumbered, necessarily fails. There is not in the lands themselves, according to Hindu Law, any inherent quality

1. (1885) I. L. R. 9 Bom. 198.
2. (1917) 34 M. L. J. 17.
3. (1900) I. L. R. 24 Bom. 556.
4. (1880) I. L. R. 5 Bom. 437.
5. W. R. (1864) 39.

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limiting them to special kinds of ownership and devolution. They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned; or they have passed into a family not subject to the custom."

It has been held in some later cases that in this case the learned Judges were under a misapprehension as to the service in question in that case having been abolished, but the principle laid down in the above passage was not questioned in any of these cases nor were we referred to any authority the other way. We entirely agree with the decision of the Bombay Court on this point and have decided to follow it. It is moreover the principle to which the Legislature has given effect in S. 8 of Regulation XXV of 1802.

In the *Naragunty case* [1] the Judicial Committee accepted the description of palayagars in Wilson's Glossary as having been originally petty chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount power, but seldom paying either, and more or less independent; but as having, at present, since the subjugation of the country, by the East India Company, subsided into peaceable land-holders. There can be no doubt that Kannivadi was a palayam of this nature. Dindigul, in which it is situated, had formed part of the dominions of Hyder and Tippoo for sometime when it was ceded to the Company by the Treaty of Seringapatam in 1792. At that time the palayagar was not in possession, having been expelled by Tippoo for failure to pay the revenue demanded from him. The Company restored the palayam to him; and the first question for consideration is on what terms this was done. The report of the Board of Revenue, D16, of January 1795 shows that the precise terms on which the restored Dindigal palayagars were to hold their palayams had not been settled, and that it was proposed to exact certain kaval or police services from them which were then necessary for the preservation of order. The Board transmitted a draft sannad defining the position of the restored palayagars. The annual sannads subsequently issued for some years no doubt follow this draft sannad, Exhibit E for 1796, E2 for 1797, E1 for 1800, E4 the corresponding muchilika for 1801, and E3 the muchilika for 1803. There can scarcely be any doubt that a similar sannad was issued for 1795 and the intervening years for

1. (1861) 9 M. I. A. 66.

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which no sannad is forthcoming, and these sannads may be taken as containing the conditions which the restored palayagars were required to observe. Paragraphs 1 to 5 deal with the payment of tribute, and the rendering of kaval services. Paragraph 6 is important as showing that the Government was already impressed with the necessity of suppressing the military service of the palayagars as a first condition of the introduction of orderly government. It provides that the palayagar is to render an account of the number of armed men in the palayam and to abide by the orders of the government as regards the dismissal of such of them as may appear unnecessary for the performance of the duties of the palayam, and proceeds "Since it is the duty of the Circar to protect the country from foreign enemies you are only to take a few of the inhabitants of the palayam into your service." We have revised the translation as the result of the discussion during the argument. The playagar was again enjoined not to take up arms "because the Company's troops have been specifically appointed for that purpose." Any breach of the conditions was to involve forfeiture. Except as to the amount of the peishcush the terms continued the same down to 1803 (Exhibit E3) after which there is no evidence of any exchange of sannads and muchilikas.

Exhibit XXVI of 2nd of October 1799 is a proclamation by Major Bannerman addressed to the inhabitants of the Tinnevelly palayams after the rebellion of the Tinnevelly palayagars ordering the surrender of arms and threatening those who retained them with death. In their Revenue letter to Fort Saint George of 11th February 1801 (Fifth report page 51: Edition Higginbotham) the Court of Directors sanctioned the gradual introduction of the permanent settlement into Madras, but laid down (p. 53) that it was of first importance that "all subordinate military establishments should be annihilated within the limits subject to the dominion of the Company", and observed that this was so incontrovertible as to preclude all expectations to be derived from an attempt to introduce a permanent system of land revenue or the exercise of a regular judicial authority till this essential preliminary was secured. In conformity with these instructions, Lord Clive on 1st December 1801 issued a proclamation addressed to the palayagars, sherogars and inhabitants of the Southern Provinces announcing the determination of the Government to suppress the use and exercise of all weapons of offence without the authority of the

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British Government. The proclamation went on: "The military service heretofore rendered by the palayagars and sherogars having been suppressed, and the Company having in consequence charged itself with the protection and defence of the palayagar countries, the possession of fire-arms and weapons of offence is manifestly become unnecessary to the safety of the people." General disarmament was therefore enjoined, but the palayagars and zemindars were permittted "to retain a certain number of persons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the palayagars", but the number was to be fixed and the pikes issued to them stamped and registered. The proclamation concluded by announcing to the palayagars, "the intention to establish a permanent assessment of revenue on the lands of the palayams upon the principles of zemindari tenure, which assessment being once fixed shall be liable to no change in any time to come, that the palayagars becoming by these means zemindars of their hereditary estates will be exempted from all military service, and that the possessions of their ancestors will be secured to them under the operation of limited and defined laws, etc." The District Judge has read the concluding paragraph, which was merely an announcement of the policy declared in the despatch from the Court of Directors, as limiting the announcement earlier in the proclamation that the military service hitherto rendered by the palayagars and sherogars had been suppressed; and he has held that the intention of the proclamation as a whole was that their military service was to continue until the issue to them of permanent sannads. Reading the proclamation as a whole and in the light of the despatch from the Court of Directors we think it is clear that the suppression of military service was intended to be unconditional.

It has however been contended that military service was exacted from the zemindar even after the proclamation, and as much importance was attached by the District Judge to the documents exhibited by the plaintiffs to show this, Exhibits D, E, F, G series, it is necessary to refer to them in some detail. Exhibits D to D 3 (b) are extracts from the Dindigul Diary kept by successive Collectors. The other exhibits of importance in this connection are letters written by or to this Palayagar of Kannivadi relating to the events mentioned in the diary. The District Judge relies on these to show that, after the British occupation, military

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services were being rendered. Most of these exhibits relate to the period anterior to 1801, and in many cases relate only to police duties. Among the latter duties may be instanced the attempts made to seize an outlaw named Tombu Gour for whose arrest a reward had been offered, referred to in Exhibit D3 (a) under dates Sepetmber 25th, December 16th, 1796 and January 10th, 1797; and the Collector's warning on June 10th, 1795, to the palayagar in Exhibit D, which the palayagar acknowledged in D4 on July 4th, 1795, against harbouring a rebel named Gopaya Naick; and the Assistant Collector's *inayatnamah,* Exhibit D6, dated July 25th, 1799, to the palayagar directing him to seize some marauders named Pujari Naick and Alwar Pillay, whom the Tahsildar had been endeavouring to capture by placing a guard of peons at the entrance of the Kannivadi District, as appears from the entry of January 18th, 1799, in Exhibit D2. The Assistant Collector's order of July 25th was acknowledged next day by the palayagar in Exhibit D7, in which he repudiates the idea that he has been friendly with these marauders, and on January 19th in Exhibit D2 he promises the Collector not to assist them.

The Collector's directions to make good property stolen by thieves belonging to his estate in the entries in Exhibit D3 (*a*) of November 4th, 1796, of March 4th, and 7th, April 16th and September 6th, 1797, and in Exhibit D3 (*b*) under dates August 29th, September 18th and October 30th, 1797, and in Exhibit D1 under date of June 27th, 1796, merely indicate that the *kaval* system, according to which kavalgars or watchmen are held responsible for tracing the whereabouts of stolen jewels, etc., and, if they fail are themselves required to make good the value of such articles, existed in those early times. In those days it appears from the entries of April 4th, and 5th, 1797 of Exhibit D3 (*a*), from the entry of July 21st 1798, of Exhibit D3, and from D16 that there was a kaval fund for remunerating kavalgars. This fund is stated in Exhibit D3 (*a*) to be quite unconnected with the peishcush or tribute payable in 'kists' (or instalments) by the palayagar for his palayam and it appears from Exhibit D16 that it was a fund raised by contributions of 'watching fees' paid by the subjects of the Crown into the hands of the palayagars who were held responsible for its administration. This resembles the present day system under which village 'kavalgars' or watchmen are appointed

by the villagers to watch their crops and other property and every ryot contributes at the time of harvest a few measures of grain from his stock at the threshing floor for the remuneration of the kavalgars for the current year. If the zemindar held any lands on condition of rendering kaval service they must have been resumed before 1812, as will be shown later.

Again we find the Collector in Exhibit D2 on January 9th 1799, instructing the palayagar to arrest any Europeans (presumably deserters from the East India Company's British troops) found straying more than two miles from camp without a passport. Again in Exhibit D17 in October 1797 the palayagar of Kannivadi is stated to have promised his assistance to the Collector against the palayagar of Komaravadi, a deposed palayagar who had escaped from confinement at Vellore. The nature of the assistance to be rendered is not mentioned in this Exhibit, but from Exhibit D 3 (*b*) it appears that he and four or five other palayagars were to come with their respective men and act as an escort of " old Lucki Naick " in conducting him from Komaravadi as soon as the arrest of this escaped prisoner was effected.

So much for the records relating to the period before the formal abolition of military duty.

The District Judge has concluded from certain Exhibits of a later date than 1801 that military assistance was rendered by this palayagar during the fighting by the Company's army against Virupakshi Naick, and against the dumb boy called Panchalakurichi Oomayan who led an insurrection against Government, and also in the rebellion of Lakshmana Naicken, in the time of Collectors Hurdis and Parish in 1803 and 1804.

An account of the part played by the Kannivadi palayagar in connection with the fighting that took place on those occasions is given in Exbibits F and G. Both of these records proceed from interested sources. Exhibit F is a petition signed by the zemindar of Kannivadi in 1837 and presented to the Board of Revenue, in which he appealed for the restoration of his palayam which had been kept under the management of Government, and Exhibit G is a genealogical history of the family written by another member of the family. It was to the interest of the writers of these documents to magnify the meritorious services rendered by various palayagars of Kannivadi to Government from time to time. G1, G2, G4, G5, G6, G7, and G8 are records similar to G.

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Exhibits G and G7, mention the fact that the palayagar's men were then in 1804 without arms (no doubt in pursuance of Government's declared policy), and thus when they accompanied the Company's sepoys in pursuit of Lakshmana Naicken it was necessary for Mr. Parish to arm 20 of them before they could be of any assistance to him. At the same time the work that they were expected to perform seems to have been that of guarding roads and passes, acting as spies of the enemies' movements, and as guides to the British troops through the forest tracks and hill passes. They could not fight because they had no arms. A more reliable account of what happened is to be found in the contemporary document, Exhibit E5 of July 1st 1804, in which it is stated that 15 men from the Kannivadi Palayagar people were sent as guides to Captain Hamilton's army "because they knew the different routes." In Exhibit D13 the palayagar of Kannivadi reports in June 1804 to Mr. Parish that he had despatched a spy to bring intelligence regarding the rebels. It would be absurd to treat this palayam as a feudal fief held on condition of rendering military service simply because the holder on one or two occasions assisted the intelligence branch of the Company's regular army.

The allusions in Exhibits D11 and D12 to "our troops" and "our detachment" in the account of the engagement with Lakshmana Naicken only show in our opinion that the Kannivadi men identified their cause with the cause of the Government, and we think that the description of fighting refers to the doings of the Company's soldiers, and does not mean that any military establishments of the palayagar were employed in the actual fighting.

Exhibits D10, E7, E8, E13, refer to the supply of bamboos to be paid for, for the use of the British troops (evidently in order to provide them and their officers with quarters). Exhibit E6 relates to the supply of cattle (probably for feeding the troops). It was regarded as the duty of the whole population to furnish the necessary supplies against payment to the officers of Government and still more to its armed forces in the field. The practice of making such requisitions for the supply of touring officers is not yet altogether obsolete. The fact that in the years 1803 and 1804 such requisitions were made and complied with in a few instances does not in our opinion show that the palayam continued to be held on condition of rendering military service and still less that it was so held at the time of the alienations now in question nearly a hundred years later.

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We have next to deal with the well known Regn. XXV of 1802 on which the permanent settlement rests in this Presidency so far as it affects the present case. It was held by the Judicial Committee in *Collector of Trichinopoly* v. *Lekkamani* [1], to be clear "that the affirmative words of the second section 'that, in consequence of the assessment the proprietary right of the soil shall become vested in the zemindars,' etc., did not either give or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right." This interpretation is strongly supported by the title of the Regulation which is "for *declaring* the proprietary right of lands to be vested in individual persons, and for defining the rights of such persons, under a permanent assessment of the land revenue." As regards the somewhat ambiguous preamble, their Lordships observed that it did not assert a right, on the part of Government to deprive or dispossess Zemindars in their life-time, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of Revenue. They then proceeded to explain the sweeping statement in the preamble to Regulation XXXI of 1802 that the ruling power had in conformity to the ancient usage of the country constantly reserved to itself and had exercised the actual proprietary right of lands of every description, and that consistently with this principle all alienations, of land, except by the consent of the ruling power, are violations of that right, and observed that "the words alienations of land" referred, not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue." Finally their Lordships observed "there is no difference in this respect" (its hereditary character) "between a palayam and an ordinary zemindary. The only difference between a palayam or zemindary which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter the Government may or may not have that power." The latter

1. (1874) L. R. 1 I. A. 282 at 306.

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words appear to mean that Government may in a particular case have precluded itself from raising the revenue, even though it has not issued a permanent sannad.

Applying these principles, their Lordships proceeded to deal with the connected case *Oolagappa Chetty* v. *Arbuthnot* [1]. The judgment is appended to the judgment in Marungapuri case which follows 1. I. A. 282. In the former case a razinamah was entered into in the time of the late zemindar making the zemindari liable for debts incurred by him. It having been held that the razinamah could be enforced except by suit, a suit was instituted but discontinued on the death of the zemindar by order of the Court which directed a fresh suit to be brought against the heir when nominated. A suit was accordingly brought against the minor zemindar in which it was claimed that the revenues and corpus were equally answerable (p. 270). The Civil Judge held the debt binding on the revenues of the zemindari in the hands of the successors and decreed the claim to that extent. The High Court reversed this decision, and held that, as the palayam in question was only held on life tenure, it could not be made liable in the hands of the son for the debts incurred by the father. The Judicial Committee held that *prima facie* the palayam was hereditary and that being so, apparently as a matter of course they held it liable in the hands of the son for the father's debts. If the revenues are liable in the hands of succeeding zemindars, that is equivalent to saying that the corpus is liable, and the decision would be conclusive of the present case, but for the fact that the point that the palayam was inalienable by reason of its owning military and police service was not raised. It is however very significant that it was not raised in that case though the defendant on the record was Mr. Arbuthnot, the Collector of Madura who represented the minor zemindar as agent of the Court of Wards and would have been likely to know if the holders of unsettled palayams were liable to render any services such as to render their estates inalienable and an exception to the general rule as to the "free liberty," of proprietors of land to make alienations which is conferred by S. 8 of the Regulation. This contention has not been raised in any other case before the present, and this consideration adds to the already heavy burden on the plaintiff of showing the existence of the bar to alienaiion on which he relies.

1. (1874) L. R. 1. I. A. 268 at 315.

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The question of the continuing liability of the palayagar for police service may now be dealt with in connection with the provisions of S. 5 of the Regulation. These provisions show a general intention to release land-holders from the performance of police services, except in special cases to be dealt with in the permanent sannad when issued, and to resume all lands and rusums granted for police service. The first part of S. 5 provides as follows: "The Government having charged itself generally with the maintenance and support of such establishments as may be requisite in the several provinces, cities and towns for the better keeping of the police, no lands shall be considered, as heretofore, to be holden on the condition of performing police duties, unless the same shall be specially provided for in the sannad-i-milkeut-i-istimrar." With this must be read S. 15, which provides that zemindars shall aid and assist the officers of Government in apprehending and securing offenders of all descriptions, and they shall inquire and give notice to the Magistrates of robbers or other disturbers of the public peace who may be found, or who may seek refuge, in their zemindaris, an obligation which was not regarded as incompatible with the power of alienation, and is very similar to that imposed on people generally and landowners in particular by Chapter IV of the Code of Criminal Procedure. Read literally S. 5 operated to release all lands forthwith from the condition of rendering police service. If this be too strict a construction, it at least shows that it was the policy of the Goverement to release them, and there is nothing in the Regulation to prevent effect being given to that intention without the grant of a permanent sannad. Police services had been required in this case by the annual sannads of which E3 for fasli 1213, (1803-4) is the last. The issue of these sannads appears to have been discontinued, and there is no evidence of any police service being demanded after 1804. Admittedly police service was as a rule abolished in all the palayams and zemindaries that received permanent sannads; and, as will be seen, the fact that no permanent sannad was issued in the case had nothing to do with the question of police service. It appears from the Fifth Report that the kaval lands or lands granted for the discharge of kaval duties which were quite different from those which the officers of an organised police force are expected to perform had been resumed before 1812; but as regards Madras, the Report does not deal

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with the question of police. A police force under officers called darogas had been introduced but did not work well; and, in accordance with the recommendations of Sir Thomas Munro, the Court of Directors issued instructions which were embodied in Regn. XI of 1816. By this measure recourse was had to the indigenous police system of the country. Under that system police as well as revenue duties had been imposed on the village headman, who was responsible as to both to the zemindar or palayagar where there was one. By the Regulation, the headman as regards police duties, was made responsible to the Tahsildar or Indian Magistrate of the locality, and zemindars were deprived of all police powers except in so far as any of the duties of the Tahsildar might be conferred upon particular zemindars by the Government under S. 39. This the Court of Directors considered should only be done in particular cases of approved respectability and willingness to co-operate in promoting the views of the Government. S. 39 was repealed by Act XVII of 1882 as having become obsolete, and thus vanished the last trace of the police powers formerly vested in the zemindar as head of his district. The Police Act XXIV of 1859, which took away the control of the police from the Tahsildars and created a separate Police Department, defined Police, in S. 1 as including 'general' and village police, Cuttoobadies, Kavalgars, and all other persons who exercise any police functions throughout the Madras Presidency. This was before the repeal of S. 39 of Regn. XI of 1816, and there is no suggestion that the Kannivadi zemindars were ever regarded as coming within this definition of Police. Be this as it may, this definition of Police was repealed by S. 2 (i) of Madras Act III of 1895, which substituted the following definition. "The word police shall include all persons appointed under this Act," thus excluding Cuttoobadies, Kavalgars, etc., whose police functions had become obsolete. The same enactment also repealed Regn. VI of 1831 which made lands held on service tenure inalienable, and only re-enacted the provision against alienation as regards village officers, except in the Scheduled Districts. In the Scheduled Districts the prohibition against alienation was continued, not only as regards the emoluments of village officers, but also as regards "other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order."

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In the rest of the Presidency the legislature evidently thought that village offices were the only offices the endowments of which required to be protected from alienation. This enactment, which came into force before the alienation now in question, goes far to show that at the date of that alienation, the services formerly required of the palayagars and others had become entirely obsolete and that there was no longer any sufficient reason for prohibiting the alienation of their lands on the grounds of public policy.

It is not questioned that the issue of permanent sannads under Regn. XXV in the terms in which they were issued released the grantees from conditions of police service, and there is no reason to suppose that the delay in issuing the sannads in this and other cases was due to any design of retaining the right to police services which were regarded as a thing to be got rid of as quickly as possible. In this connection an observation in *Chauki Goundan* v. *Venkataramanier*,[1] which was referred to with approval by Scotland, C. J., in *Lekkamani* v. *Puchaya Naikar*[2] may be cited again, and with greater force, now that the assumption that palayagars had only life estates has been displaced: "The palayagar of an unsettled palayam may, according to the generally received theory as to his rights, have only an estate for life in his palayam; but for such an estate as he has, his relation to the Government on the one side and to the occupiers of lands within his palayam on the other side, resembles that of a zemindar." There is really no reason now why an unsettled palayam should be inalienable any more than a settled one.

As regards the revenue history of this particular palayam, in 1796 a commission reported that these palayagars should be allowed personally to retain one-third of the computed value of their land. Mr. Hurdis, who was Collector from September 1796 to December 1803, was directed to carry out a field survey and to present to the Board of Revenue a detailed report such as would enable them to arrange a permanent settlement (Nelson part 4 p. 31). Unfortunately, as Mr. Nelson observes, he over-estimated the capabilities of the District and the permanent settlement of Dindigal introduced on the basis of this survey had to be abandoned. Exhibit XXVI (b1) shows the total beriz of the Kannivadi palayam as estimated by Mr. Hurdis. Of this the palayagar was allowed as before provisionally to retain 30 per cent,

1. (1870) 5 M. H. C. R. 208.     2. (1871) 6 M. H. C. R. 203.

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leaving a peishcush of Pagodas 10,897 or Rs. 38,139-14-2 payable to Government. This peishcush did not represent 30 per cent. of the real income, or any thing like it, and owing to the defective nature of Mr. Hurdis's assessment and possibly other reasons, a permanent sannad was not issued to this and other palayagars on the basis of his assessment. From 1816 to 1843 in consequence of the palayagar's inability to pay the peishcush, Government took the palayam under its own management and allowed him the 10 per cent on the net collections. In 1843 the palayam was restored to the palayagar, Exhibit XXVI (c). The muchilika which was then taken from him appears to proceed upon the footing that all he was liable to do was to pay the peishcush demanded of him and that in default of payment the palayam was liable to be sold. It certainly goes to show that no condition of military or police service was recognised as existing at that time. Exhibits XXII*g* and XXII*h*, dated 9th July 1843 are mortgages of the *zamindari* to pay previous debts and save the *zemindari* from annexation by Government. Exhibit XXIII is a lease for 30 years dated 20th July 1851 in discharge of debts which are stated to have been contracted by the *zemindar* himself, his father and his ancestors. Exhibit H series show that negotiations went on for some years after this as to the grant of a permanent sannad and that Government were prepared to grant a permanent sannad without increasing the peishcush, but that this intention was not carried into effect in the supposed interest of the *zemindar* himself. Exhibit H5. Nothing is to be found about any military or police service in this correspondence. In 1881 on the death of the zemindar Bangaru, who had executed the lease of 1861, his brother who succeeded brought a suit to recover the *zemindari* from the lessee. In his plaint he raised the contention that the alienations of his predecessors were not binding on the estate in his hands, and this was the subject of the 4th issue. It was not however suggested that the inalienability depended in any way on the duty of rendering military and police service. The District Judge held that the lease was not binding on the plaintiff as a lease but was binding on him as a mortgage, and gave a decree for redemption. Before the High Court the *zemindar* does not seem to have pressed the appeal on the ground that the alienations by his predecessors were not binding upon him. Probably the

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decision of the Privy Council in *The Marangapuri case* [1] was held conclusive on this question in the High Court where the controversy appears to have been as to the amount of the mortgage debt. In connection with this litigation and the subsequent redemption the zemindar contracted usufructuary mortgages Exhibits 7, 3, 5, 9, 6, 7a, 4, 22 series 8 and 10, and lastly a consolidating mortgage Exhibit 2 on 14—12—1895 and a supplementary mortgage Exhibit 18, dated 10—2—1898. Exhibit 2, to which the then zemindar and his son the father of the present plaintiff were parties, was for upwards of ten lakhs of rupees.

The Bank brought O. S. 23 of 1897 on this mortgage and obtained a consent decree for sale against the zemindar and his son on 16—8—1898, Exhibit XV*d*, by which the defendants were to pay Rs. 13,15,000 on or before 15—8—1900 and the estate was to be sold in default. The plaintiff's grand-father died on 16—7—1899. On 14—3—1900 the Bank applied for an order absolute for sale under S. 89 of the Transfer of Property Act, and on 21—3—1900 the Court made the order as follows : "Defendant by Mr. Subramania Aiyar does not put forward any objection. Decree made absolute." The estate was subsequently sold and purchased by the Bank, who obtained a sannad in 1905, and then sold it to the present 1st defendant. The plaintiff's father died on May 24th 1911, and it was in the present suit instituted on 23—7—1914 that the contention that the zemindari was inalienable on account of the zemindar's liability to render military and police services was raised for the first time.

In our opinion this contention is only an ingenious afterthought. The liability of these unsettled palayams for ancestral debts was treated by the Privy Council in *The Gantamanaickanur Case* [2] as necessarily following from the establishment of the hereditary nature of the state. There are now no police or military services to be rendered. In this particular estate there have been continued alienations by way of mortgage which have been treated as binding by succeeding zemindars. Though the contention that they were not binding was raised in the litigation of 1881, this was not on the ground of any military or police service, and the contention was not pressed in the High Court. Lastly the fact that the plaintiff's father was a party to the mortgage of 1895 and to the consent decree and did

1. (1879) L. R. 1 I. A. 282.   2. (1879) L. R. 1 I. A 282, 315.

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not object to the sale shows that the alienable character of the zemindari was fully recognised.

The learned Advocate-General has relied on certain decisions such as *The Udayarpalayam case* [1] and *The Ramnad case* [2] in which it was held that certain zemindaris restored by British Government to the heirs of the former zemindars were restored with the incident of impartibility which had originally attached to them in their character of petty chieftains rendering service to the paramount power, but these cases did not decide or proceed on the footing that any such services were still to be rendered; and, as those were cases in which a permanent sannad had been issued, it is clear that there were no such services in existence at the date of suit. He also relied on certain decisions as to Ghatwal tenures in Northern India but in these cases the succession is not purely hereditary, and Government by the exercise of the right to choose the successor from and among the heirs, manifests its continued recognition of the office of Ghatwal even though the duties have become nominal. On a full consideration of the whole question, we are unable to agree with the District Judge, and have come to the conclusion that the military and police services for which the zemindar was at one time liable had been abolished long before the alienations in question, even though Government for quite other reasons had delayed the issue of a sannad under Regulation XXV of 1802 by which the peishcush payable by him as a peaceable land owner exempt from such services would have been finally settled.

The only remaining question is, where the suit is barred on the ground that, when the suit was instituted, more than twelve years had elapsed from the time when the 1st defendant's vendors got into possession under their purchase at the Court auction. There can be no doubt, that assuming the estate of the zemindar to be for life only as contended by the plaintiff, the zemindar for the time being would ordinarily represent the estate as held in *Radhabai* v. *Anantrav* [3] and numerous other cases and that therefore time would have begun to run against the plaintiff's father from the date when the Bank got possession and the suit would be barred as more than twelve years had elapsed before it was instituted. The question, however, arises whether

1. (1901) I. L. R. 24 M. 562. 2. (1893) I. L. R 24 M. 613.
3. (1885) I. L. R 9 Bom. 198.

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the plaintiff's father had not debarred himself from suing to recover possession and whether time did not begin to run only from the date of his death and plaintiff's succession. As has been already stated, the plaintiff's father joined in the mortgages of 1895 and consented to the decree being passed against him for the sale of the zemindari and personally for the mortgage debt and did not object to the order for sale. At the date of the mortgage and the consent decree he was only a reversioner with a *spes successionis* and had no power to alienate his interest in the zemindari either by executing the mortgage or consenting to the decree, and these alienations did not take effect against him when he succeeded, as held in *Ramasami Naik* v. *Ramasami Chetti* [1], which is in accordance with a very recent decision of the Judicial Committee not yet reported. [The case has subsequently been reported in *Amrit Narayan Singh* v. *Gaya Singh* [2]—Rep.]. At the date however of the application for the order for sale, which he did not oppose, the plaintiff's father had succeeded to the estate, and his life interest in the zemindari was liable to be attached and sold in execution of the consent decree in so far as it made him personally liable. If the consent decree had been for sale only, it may be that the sale would not have passed his life interest even though he did not oppose the order for sale, but he was also personally liable on the decree and at the date of the application for the order for sale he had no answer to an application for the attachment and sale of his life interest in execution of the decree against him personally. In these circumstances it may be that the sale was binding on his life interest; and, if so, it is argued he was not in a position to sue for possession and that his successor had a fresh starting point. The starting point under article 142 is the date of the dispossession or discontinuance. To avoid the bar it would apparently be necessary to hold that the fact that the plaintiff's father had debarred himself from suing for possession took the case not only out of article 142, but also out of article 144, as the present plaintiff's father would appear to come within the word plaintiff as used in that article, and to make Art. 120 applicable to the case. The starting point in that article is, when the right to sue accrues, and there would be no difficulty in holding that the right to sue does not accrue until there is some one who can sue successfully.

1. (1906) I. L. R. 30 Mad. 255, at 262, 263.
2. (1917) 34 M. L. J. 298.

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See *Murray* v. *East India Company* [1], *Musurus Bey* v. *Gadban* [2] and the recent decision of the Privy Council in *Meyappa Chetty* v. *Supramanian Chetty* [3]. In the view we take of the other question it is unnecessary to discuss or decide the point In the result the appeal must be allowed and the suit dismissed with costs throughout.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

### [FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Kadirvelu Nainar ... *Appellant* (Plaintiff)*

*v.*

Kuppuswami Naicker ... *Respondent (Defendants).*

*Decree—Setting aside—Fraud—Tendering of false evidence and suppression of evidence—Suit to set aside decree, if maintainable.*

A suit will not lie to set aside a judgment on the ground that it was obtained by false evidence tendered at the trial and by the suppression of evidence.

*Venkattappa Naick* v. *Subba Naick*,[4] overruled.

*Chinnayya* v. *Ramanna* [5], *Munshi Mosuful Huq* v. *Surendra Nath Ray* [6] *Janki Kuar* v. *Lachmi Narain* [7], relied on.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 498 of 1916.

[The case came on for hearing in the first instance before the Chief Justice and Sadasiva Aiyar, J.]

The Court made the following

### ORDER OF REFERENCE TO A FULL BENCH.

Sadasiva Aiyar, J.

*Sadasiva Aiyar, J.*:—The plaintiff is the appellant. The present defendant had brought a suit against the present plaintiff in the Presidency Small Cause Court for money due by the plaintiff to a chit fund of which the defendant was the stake-holder and in which the plaintiff had four shares, the plaintiff having executed a promissory-note in favour of the defendant. The defendant obtained a decree for Rs. 117-2-0 in the suit filed in the Presidency Court of Small Causes against

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* C. C. C. No. 7 of 1917. 13th April 1918.

1 5 B. & A. 204.
2. (1894) 2. Q. B. 352,
3. (1916) L. R. 43 I. A. 113, 120.
4. (1905) I. L. R. 29 M. 179.
5 (1913) I. L. R 38 M. 208.
6. (1912) 16 C. W. N. 1002.
7. (1915) I. L. R. 37 A. 535.

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the plaintiff notwithstanding certain defences raised by the plaintiff. The decree is dated the 5th February 1914. The present suit was brought on the 14th December 1916 in the City Civil Court, (*a*) for a declaration that the decree in Small Cause Suit No. 1492 of 1914 is null and void, and (*b*) for a decree directing the defendant to pay the plaintiff Rupees 399-12-0 (the damages incurred by the plaintiff through the defendant's fraud in obtaining the unjust decree) with interest thereon and costs of suit. The grounds alleged as the foundation of this claim are found in paragraphs 8 to 10 of the plaint as follows : "The defendant falsely swore in that suit that he paid only ten monthly instalments," (to the chit) and that certain receipts were passed only for instalments paid in respect of the chit fund transaction, and not for independent loans advanced by the plaintiff to the defendant. "That the defendant also dishonestly suppressed the fact that he was bound to give credit for Rupees 68 due to the plaintiff as premia in the chit and that the decree of the Small Cause Court which was obtained by the plaintiff's wilful perjury and suppresssion of material facts was obtained in fraud of the Court."

The plaintiff's suit was dismissed by the learned City Civil Judge on the ground that his Court cannot be converted into a Court of Appeal on a question of fact from the decision of the Small Cause Court. In *Venkatappa Naick* v. *Subba Naick* [1] Boddam and Moore, JJ., purported to follow the English cases in *Abouloff* v. *Oppenheimer*, [2] and in *Vadala* v. *Lawes* [3] and held that a judgment obtained by perjury is a judgment obtained by fraud committed upon the Court and could be set aside in a separate suit. The learned Judges evidently thought that the decision in the well-known case of *Flower* v. *Lloyd* [4] was overruled by the two later English decisions referred to by them. The decision in *Venkatappa Naick* v. *Subba Naick* [1] has been afterwards considered in at least two cases in this Court. In *Kumaraswami Chetty* v. *Kamakshi Ammal* [5] which came before Sundara Aiyar, J. and myself, I said "I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree

1. (1905) I. L. R. 29 Mad. 179.
2. (1882) L. R. 10 Q. B. D. 295.
3. (1890) L. R. 25 Q. B. D. 310.
4. (1878) L. R. 10 Ch. D. 327.
5. (1912) 23 M. L. J. 187.

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had been obtained on perjured testimony. I know it has been so held in *Venkatappa Naick* v. *Subba Naick* [1] but I have grave doubts as to the correctness of that decision." Sundara Aiyar, J. agreed with my above observations. Then there is a reported case in *Chinnayya* v. *Ramanna* [2] in which Benson and Sundara Ayyar. JJ. dealt elaborately with the same point. At page 206 it is said, " It is indisputable that the decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated ". " The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent *from conducting his case properly by tricks or misrepresentation*, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation

1. (1905) I. L. R. 29 Mad. 179. 2. (1912) I. L R. 38 Mad. 203.

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of his opponent was false." Then the learned Judge refers to Black on Judgments in 23, Cyclopædia of American Law and Procedure, as regards the acts which can be relied on as constituting the fraud which would vacate a judgment, namely, things which are collateral to the matters which have been adjudged by the Court. Then the passages from the judgment of the Lord Justice James in *Flower* v. *Lloyd* [1] are quoted: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given?" "There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternatively *ad infinitum*. There is no distinction in principle between the old common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments supposed to be final, only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds." The learned Judge declined therefore to follow *Venkatappa Naick* v. *Subba Naick* [2]. As regards the two English cases *Abouloff* v. *Oppenheimer* [3] and *Vaddala* v. *Lawes* [4], they were cases of suits brought upon foreign judgments. In the

1. (1878) 10 Ch. D 327.
2. (1905) I. L. R. 29 Mad. 179.
3. (1882) 10 Q. B. D. 295.
4. (1890) 25 Q. B. D. 310.

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case in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* [1] Jenkins, C. J. says at page 998 that the jurisdiction to set aside a decree for fraud " is to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation." In *Ram Ratan Lal* v. *Bhuri Begam* Richards, C. J. quotes with approval passages from *Flower* v. *Lloyd*, [3] dissents from *Lakshmi Charan Saha* v. *Nur Ali* [4] which was disapproved of in the Calcutta High Court itself in *Munshi Mosuful Huq* v. *Surendra Nath Ray* [5] and approves of Jenkins, C. J's observation in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* [1]. In *Janki Kuar* v. *Lachmi Narain*[6] also, *Venkatappa Naick* v. *Subba Naick*[7] was expressly dissented from and the learned Judges say that the weight of authority is in support of the view taken in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* [1] and in *Munshi Mosuful Huq* v. *Surendra Nath Ray* [5], that is, in favour of the view taken in *Flower* v. *Lloyd* [3] and in the Madras case *Chinnayya* v. *Ramanna* [8]. I think that in India the considerations mentioned by James, L.J., in *Flower* v. *Lloyd* [3] apply with very great force as it is dangerous to allow a fresh suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. The two cases relied on in *Venkatappa Naick* v. *Subba Naick* [7] and the later case in *Chandler* v *Blogg* [9] merely follow old English precedents and do not attempt to tackle with the weighty reasons given in *Flower* v. *Lloyd* [3]. The passion for litigation wherever it exists in this country is likely to turn into almost incurable mania and the doctrine of *res judicata* would become practically useless if *Laksmi Charan Saha* v. *Nur Ali* [4] followed in Indian Courts.

Having regard however to the conflict of views found in the decisions in *Venkatappa Naick* v. *Subba Naick* [7] and in *Chinnayya* v. *Ramanna* [8] I would refer the following question to the Full Bench :—

" Was the question of law considered in *Venkatappa Naick* v. *Subba Naick* [5] rightly decided in that case ?"

1. (1914) I. L R 41 Cal. 990.
2. (1915) I. L. R. 38 All. 7.
3. (1878) 10 Ch. D. 327
4. (1911) I. L. R. 38 Cal. 936.
5. (1912) 16 C. W. N. 1002.
6. (1915) I L R. 37 All. 535
7. (1905) I. L R 29 M. 179.
8. (1912) I L. R. 38 Mad, 203.
9. (1898) L. R. 2 Q. B. 36.

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*Chief Justice*:—I concur in the order of reference.

*K. S. Ganapathi Iyer* for appellants: The suit is maintainable. The decisions to the contrary purport to follow the obiter dictum in *Flower* v. *Lloyd* [1], which has been questioned subsequently in *Robinson* v. *Smith* [2]. See also *Vadala* v. *Lawes* [3]. [The Chief Justice.—That was a case of a foreign judgment. In India S. 13 of the C. P. Code govens the matter.] A judgment obtained by fraud can be vacated. Halsbury's Laws of England, Vol. 18, p. 216. [The Chief Justice.—In England the verdict of the jury on a question of fact is conclusive. In India you have a right of appeal on facts and you have a remedy by way of review. There is all the greater reason therefore why a suit of this kind does not lie in this country.] The existence of other remedies does not take away the right of suit. *Arunachellam Chetty* v. *Sabapathy Chetty* [4], *Khagendra Nath Mahata* v. *Pran Nath Roy* [5]. Reference was made to *Priestman* v. *Thomas* [6], *Baker* v. *Wadsworth* [7], *Cole* v. *Langford* [8], *Exparte Alice Cockerell* [9]. *Venkatappa Naick* v. *Subba Naick* [10] has been followed in *Lakshmi Charam Saha* v. *Nur Ali* [11].

*K. Venkataraghavachariar* for respondent referred to *Janki Kuar* v. *Lachmi Narain* [12] and *Ran Ratan Lal* v. *Bhuri Begam* [13], besides the cases cited in the order of reference.

The Court expressed the following

**Opinion**:—In *Venkatappa Naick* v. *Subba Naick* [10] the Court decided that a suit could be instituted to set aside a decree on the ground that it had been obtained by false evidence tendered at the trial and by the suppression of evidence. On reference to the printed papers it appears that the alleged suppression of evidence consisted in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained

1. (1878) L. R. 10 Ch. D. 327
2. (1911) 1 K. B. 711 C. A.
3. (1890) L. R. 25 Q. B. D. 310.
4. (1917) 33 M. L. J. 499.
5. (1902) I. L. R. 29 C. 395.
6. (1884) 9 P. D. 210.
7. (1898) 67 L. J. Q. B. 301.
8. (1829) 9 Q. B. 396.
9. (1878) 4 C. P. D. 9.
10. (1905) I. L. R. 29 M. 179.
11. (1915) I. L. R. 38 C. 936.
12. (1915) I. L. R. 37 A. 535.
13. (1915) I. L. R. 38 A. 7.

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by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie for the reasons given by Sundara Ayyar, J. in *Chinnayya* v. *Ramanna*, [1] by the Calcutta Court in *Munshi Mosuful Huq* v. *Surendra Nath Ray*, [2] and by the Allahabad Court in *Janki Kuar* v. *Lachmi Narain*. [3] We are therefore of opinion that *Venkatappa Naick* v. *Subba Naick* [4] was wrongly decided and must be overruled.

A. V. V.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, KT., CHIEF JUSTICE AND MR. JUSTICE SESHAGIRI IYER.

Subba Reddi ... *Appellant* 1st Defendant.*

v.

Alagammal and another ... *Respondents-Plaintiff and 2nd Defendant.*

*Hindu Law—Partition Deed—Construction—Division of some items of joint family property—Division in status—Presumption.*

A partition deed entered into between a Hindu father and his son, after reciting that they had till then lived as members of a joint family and that owing to differences between the women in the house it became necessary to effect a partition, proceeded to divide the joint family properties between the sharers, except the outstandings which to the knowledge of both the parties were considerable and to which there was no reference in the partition deed.

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*Held*, on the construction of the partition deed that the father and son became divided in status and that the outstandings therefore ceased to be their joint family property.

*Per Chief Justice*: The mere fact that the members of a joint Hindu family execute a document dividing particular items of property does not raise a presumption that they intended to become divided in status. If such a presumption is to be raised there must be something else in the document to raise it.

*Per Seshagiri Aiyar, J.*: Once a partition is proved, the presumption arises that it effected a complete severance of interest.

*Vydianatha Iyer* v. *Aiyaswami Aiyar*[5], *Anandibai* v. *Hari Suba Pai*[6], relied on.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suit No. 76 and 151 of 1911, respectively.

*T. Rangachariar* and *K. V. Krishnaswami Aiyar* for the Appellants.

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* A. S. Nos. 47 of 1913 and 243 of 1914. 25th October 1915.

1. (1912) I. L. R. 38 Mad 203.
2. (1911) 16. C. W. N. 1002.
3. (1915) I. L. R. 37 All. 535.
4. (1905) I. L. R. 29 M. 179.
5. (1908) I.L R 32 M. 191 : 19 M.L J. 94.
6. (1911) I. L. R. 35 B. 293

*S. Srinivasa Aiyangar* and *A Krishnaswami Aiyar* for the Respondents.

The Court delivered the following

A. S. No. 47 of 1913.

Wallis, C. J.

**Judgment**:—*The Chief Justice.*—The only question of any difficulty in this case is whether Ex. VI is to be construed as effecting a division in status as well as a division of the specific properties with which it deals expressly. This appears to me to be mainly a question of the construction of the document. In *Vaidyanatha Iyer* v. *Aiyaswami Aiyar* [1], where a partial partition of property was held to raise a presumption of division in status, there was no deed of partition and I do not think that case is an authority for holding that wherever the co-parceners execute a document dividing a particular item of property that raises a presumption that they intended to become divided in status. If such a presumption is to be raised, there must in my opinion be something else in the document to raise it. This was a case of partition between the 1st defendant and his father, the 1st defendant being the son by the second of the father's three wives, and the partition was brought about by the father who was ill and anxious to make provisions for his first and third wives, as he did immediately afterwards in the will, Ex. VII, which he executed on 3rd September, the partition-deed, Ex. VI, having been executed on the 25th August, Whereas the partition deed appears to have included expresslv all the joint family properties except the outstanding decrees and debts which were not mentioned and were considerable, the will bequeaths to the two wives not only the moveable and immoveable properties taken by the testator under the partition deed, Ex. VI, but also "all the moveable and immoveable properties, outstanding loans and properties belonging to me at present, but not included in this will and the moveable and immoveable properties, outstanding loans and properties which I may hereafter acquire." This shows if proof were necessary that at the time of Ex. VI all parties must have been perfectly well aware of the existence of other joint family properties which were not included in the partition-deed and the question, in my opinion, is whether from the terms of the deed we can gather that it was the intention of the parties to remain joint or become separate as to these items also. I do not think any strong presumption arises from the

1 (1908) I. L. R. 32 M. 191 : 19 M. L. J. 94.

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situation of the parties who were father and son. If the father was anxious to partition all the joint family properties with a view to leaving his share to his two wives, it is strange he did not do so expressly and it has been argued that such was not his intention and that he probably thought that the Rs. 20,000 he took under the deed would be sufficient for these wives, and was willing that his son should take the rest by survivorship. As against this, there is the recital in the deed that there had been differences between the 1st defendant and his father as well as between the women of the family. On the whole I do not think it is safe to draw any inference as to the motives actuating the parties. The partition deed, however, after providing for the division of the scheduled properties, goes on : "As we have effected partition in this manner" and provides that the 1st defendant's mother who had been living in his family should be maintained by him and not by her husband. I have come to the conclusion, though not without hesitation, that these provisions are sufficient to enable us to raise a presumption that the parties intended to become divided in interest and that the decrees and outstanding debts were not divided then simply because they had not been collected and it was not possible to make a satisfactory division then as it could not be foretold what they would realize. The appeal will be dismissed with costs.

A. S. No. 243 of 1914.

This case follows my decision in Appeal No. 47 of 1913, and I dismiss the appeal with costs.

A. S. No. 47 of 1913.

Seshagiri Aiyar, J.

*Seshagiri Aiyar, J.*—I agree. Mr. Rangachariar frankly conceded that in the face of the overwhelming evidence there is regarding the consent of his client to the division, he is not prepared to argue that the partition was brought about by undue influence.

The only question remaining for consideration is whether the father and son were divided in status with reference to the outstandings not specifically mentioned in the deed of partition. In my opinion the language of the document shows that the parties to it were no longer to remain joint. It says (a) we have lived *hitherto* as members of a joint family ; (b) that owing to differences among females, it has become necessary to effect a partition; (c) we shall effect a partition in respect of the undermentioned properties.

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The list of outstandings is not among the properties mentioned in the schedule. It has also to be mentioned as pointed by Mr. Rangachariar that the usual clause "that from this day forward there shall not be property relationship but only blood relationship" is not to be found in this document. Nonetheless I am of opinion that the intention of the parties was to get separated from each other; the reason for the necessity is given in the document. The 1st defendant is the son by one of the wives who was not living with her husband, and the pleadings and the evidence in this case show that the father effected the partition with a view to devise his share of the properties to his other two wives. I am unable to see that the father had any object in allowing particular portions of the property to continue as joint property. The explanation suggested by Mr. Srinivasa Aiyangar for their omission from the schedule is the most natural one. There were debts and decrees. It was apparently thought that the moneys should be apportioned as they were recovered. Some may have been or prove to be bad debts and it was not thought expedient to divide the debts at that time.

On principle, I am clear that the father and son became divided in status. It is pointed out by Mr. Ghose in his Hindu Law that there is nothing in the Smrithis to encourage a partial partition. The practice has grown up in recent years. Mr. Mitra in his Tagore lectures dealing with this special question quotes from the Smrithis and commentaries to show that partial partition was unknown to Hindu Law. I do not think it necessary to quote *excerpts* from the texts to substantiate this position (see Mitra on the "Law of Partition," pp. 330 and 331.)

As regards the decided cases Sir Richard Garth in *Radha Churn Dass* v. *Kripa Sindhu Dass* [1] says, "It seems indeed very doubtful whether by the Hindu Law any partial partition of the family property can take place except by arrangement." The decisions in *Satya Kumar* v. *Satya Kripa* [2], *Bhowani Proshad* v. *Juggernath Shahu* [3] and *Ajodhya Pershad* v. *Mahadeo Pershad* [4] prove that with the consent of the co-parceners a partial partition is possible. The decisions in *Thimmi Reddy* v. *Achamma* [5], *Kandaswami* v. *Doraswami Iyer* [6] only

1. (1879) I. L. R. 5 Cal. 474.
2. (1909) 3 I. C. 247.
3. (1909) 13 C. W. N. 309
4. (1909) 14 C. W. N. 221.
5. (1865) 2 M. H. C. R. 325.
6. (1880) I. L. R. 2 M. 317 at p. 324.

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say that there can be a partial partition. On the other hand in *Vaidyanatha Iyer* v. *Aiyasami Iyer* [1], it was clearly laid down that when once a partition was made, the presumption is that it effected a complete severance of interests. This was followed in *Sundaramma* v. *Kamakotiah* [2]. In *Anandibai* v. *Hari Suba Pai* [3], Chandavarkar, J. says : "If it is proved that there had been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united." I entirely agree. The recent decision of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain* [4], indicates that when one member intimates his willingness to get separate from the others that would effect a division in status. In the present case there was an agreement to become divided in consequence of misunderstandings among the female members of the family. I am unable to hold that the status of co-parcenery was intended to be contiuued with regard to the properties not specifically dealt with in the partition deed. It is conceded that apart from the language of the document there is no evidence to prove that the parties intended to remain joint with reference to the properties not specifically mentioned. I would dismiss the appeal with costs.

A. S. No. 243 of 1914.

I agree that this appeal also should be dismissed with costs.

A. V. V.

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[*End of Vol. XXXIV.*]

1. (1908) I. L. R. 32 M. 191.
2. (1914) 26 I. C. 514.
3. (1911) I. L. R. 35 B. 293.
4. (1912) I. L. R. 35 A. 80=24 M. L. J. 345.

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In pursuance of oral submission to arbitration by certain members of a family of their claim to various properties, an oral award was given by the arbitrators by which a hypothecation bond of the value of less than 100 Rs. was allotted to the plaintiff who, however, was not the person in whose favour the bond had been executed. The award was not made a rule of Court nor did the holder of the bond assign it to the plaintiff. In a suit on the bond by the plaintiff, *held* that the award had the effect of passing title to the plaintiff who was therefore entitled to sue on the bond.

It is not essential to the validity of an award that it should be in writing.

Per *Seshagiri Aiyar*, *J.* (*Napier*, *J.* contra). In India an award made on a reference to arbitration without the intervention of the Court has the effect of a judgment, though not made a rule of Court.

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Where, on a petition presented under S. 378 of the Code of Civil Procedure, 1882, for liberty to withdraw from the suit with permission to bring a fresh suit, the Court passed the order "plaintiff is permitted to withdraw from the suit," *held* that the order must be read with the petition and construed as granting it *i.e.*, as granting permission to file a fresh suit.

*Golam Mahomed* v. *Shibendra Pada Banerjee.* (1908) I. L. R. 35 C. 900 at 995 approved.

*Narayana Tantri v. Nagappa.* (*The Chief Justice, Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) ... ... ... 515

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When a party has been properly impleaded as one of the defendants in a suit and the case against him would have proceeded to judgment, but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is a " defendant against whom a suit has been dismissed" within the meaning of the explanation to S. 47 of the Civil Procedure Code.

A mortgage of village service inam lands in a proprietary estate executed after the grant of the title-deed of enfranchisement, but before the date of the notification contemplated under S. 17 of the Madras Act II of 1894, is illegal and inoperative when it is made and does not become operative on the subsequent enfranchisement of the lands.

Where the Government issued an inam title-deed which recited that the inam consisted of an assignment of land revenue and commuted its right to resume the assignment in consideration of payment to Government of a quit rent in addition to the existing jodi payable to the proprietor and it said nothing about the enfranchisement of the inam or the lands from the condition of service, they remain liable as before and continue to form the emoluments of the village office until the issue of the notification. The lands therefore continue subject to the prohibition against any incumbrance and any alienation of the inam lands prior to the notification is void at the time it is made.

S. 43 of the Transfer of Property Act has not the effect of validating the alienation after the notification, by the transfer operating on the alienable interest acquired by the transferor.

*Sannamma* v. *Radhabhayi.* (*The Chief Justice, Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) F. B. ... ... 17

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———**S. 80**—*Public Officer*—Mala fide *action in discharge of his duties —Notice under S.* 80 *whether essential before suit—" act purporting to be done in his official capacity," meaning of.*

Where a public officer in the discharge of his duties acts *mala fide*, he is entitled to notice before action under S. 80 of the Civil Procedure Code.

*Jogendra Nath Roy Bahadur* v. *Price* (1897) I.L.R. 24 C. 584 approved. *Shahebzadee Shahunshah Begum* v. *Fergusson* (1881) I. L. R. 7 C. 499 and *Muhammad Saddiq Ahamed* v. *Panna Lal* (1903) I. L. R. 26 A. 220 dissented from.

*Per Chief Justice*:—The expression "act purporting to be done in his official capacity" in S. 80 of the Civil Procedure Code means "an act *intended to seem* to be done by him in his official capacity."

*Per Sadasiva Aiyar, J.* :—An act done by a public officer would purport to be an act done in his official capacity, not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

*Per Spencer, J*:—The word "purporting" covers profession by acts or by words or by appearance of what is true as well as of what is not true.

*Samanthala Koti Reddi* v. *Pothuri Subbiah. (The Chief Justice, Sadasiva Aiyar and Spencer, JJ.) F. B.* ... ... ... 494

———**S. 100 (1)** (a)—*Custom or usage—Finding as to, if one of fact or of law—Interference by High Court in Second appeals, limits of—* Mirasidar—*Right to* Thunduwaram—*Custom in Chingleput District—Admissions by party to the suit, value of—Suit for recovery of* Thunduwaram, *not cognizable by Small Couse Court.—Provincial Small Cause Courts Act, Sch. II Art.* 13—*Second appeal, maintainability of—Civil Procedure Code, S.* 102.

*Held by the Full Bench*:—The question whether the facts found by the courts below establish a valid and binding custom or usage is a question of law but the question whether such a state of facts has been proved by the evidence is one of fact on which the High Court, in second appeal, is bound by the findings of the lower appellate court.

*Kakarla Abbaya* v. *Raja Venkata Papayya Rao.* (1905) I. L. R. 29 M. 24 overruled. —*Pankajammal* v. *The Secretary of State for India.* (1916) 32 M. L. J. 237. *Kailas* v. *Padmakisor.* (1917) 25 C. L. J. 613. Referred to.

The express admissions of a party to the suit are strong evidence against him and courts will not be justified in ignoring them as of no importance.

The liability to pay *swatantrams*, though a well-known incident of the *mirasi* tenure in the Chingleput District, is not universally prevalent. Where, therefore, a tenant denies the right of a *mirasidar* to *Thunduwaram* the onus is on the *mirasidar* to prove that he is entitled to the dues by the custom of the estate or the neighbourhood.

*Sakkaji Rao* v. *Latchmana Goundan*, (1880), I. L. R. 2 M. 149. Relied on.

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*Held further*, reversing the decision of the Court below, that the evidence in the case was sufficient to prove the customary right of the mirasidar to receive *Thunduwaram* from the ryots of the *mirasi* village.

Per *Sadasiva Aiyar and Napier, JJ.*—A suit by a *mirasidar* for recovery of *Thunduvaram* from a ryot, is a suit falling within Art. 13 of Sch. II of the Provincial Small Cause Courts Act. Consequently the decree in such a suit is open to second appeal though the value of the claim is less than Rs. 500.

*Kumarappa Reddi* v. *Manavala Goundan* (*The Chief Justice, Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) *F. B.* ... ... 104

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——— O. 17 Rr. 2 and 3—*Scope of—Rules independent and mutually exclusive — R. 3 applies only when parties are present on the adjourned date*

*Per Sadasiva Aiyar* and *Kumaraswami Sastri, JJ.*

Rules 2 and 3 of Order 17 of the Civil Procedure Code are independent and where the requisites of rule 2 are satisfied that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of R. 3.

Rule 3 applies only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do.

*Chandramathi Ammal* v. *Narayanaswami Aiyar* (1909) I. L. R. 33 M. 241=19 M. L. J. 760, followed.

*Per Chief Justice*: When a case is called and the defendant is absent and the Court resolves to proceed against him ex parte, there is nothing to prevent the court from applying the provisons of O. 17 R. 3 and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do but that disposal will be none the less ex parte and the decree will be liable to be set aside under O. 9 R. 13.

There is no conflict at all between the two rules, O. 17 Rr. 2 and 3, and each may be fully applied at the proper stage of the case.

The decision in 33 Mad. 241 in so far as it laid down that the two rules must be read as mutually exclusive went too far.

*Pichamma* v. *Sreeramulu*. (*The Chief Justice, Sadasiva Ayyar and Kumaraswami Sastri, JJ.*) *F. B.* ... ... ... 24

——— O. 21 R. 63—*Suit by unsuccessful claimant—Onus of proof—Decree executed one of foreign Court—Effect—Foreign judgment—Validity—Judgment based on wrong view of law—Judgment opposed to "natural justice"—What is.*

Where, in execution of a decree passed by the Cochin Court against a person described as the manager of a joint Hindu family and transferred to the British Court under S. 44 of the Code of Civil Procedure, property of the alleged joint family was attached, and a claim preferred to the same by the younger brother of the judgment-debtor on the ground amongst others, that even before the Cochin suit, he and his brother (the judgment-debtor) had become divided, was rejected, *held*, in a suit brought by the unsuccessful claimant under O. 21, R. 63 of the Code to establish his right, that the onus was on him of proving the division set up by him.

A wrong view as to onus will not have the effect of rendering a foreign judgment one not given on the merits.

A mere incorrect view of law by a foreign Court will not give jurisdiction to our Courts to say that its judgment is opposed to natural justice.

Meaning of term "natural justice" when used in reference to foreign judgments.

*Rama Shenoi* v. *Hallagna.* (*Seshagiri Aiyar and Bakewell, JJ.*) .... 295

———**O. 21, Rr. 71, 84, and 86**—*Sale in execution of the right to have a reconveyance within a specified day—Deposit of 25 per cent—Balance not paid within 15 days of sale—Re-sale after the expiry of the period for reconveyance—Period of reconveyance elapsed pending the period of 15 days—Right to claim the deficiency in the re-sale—Scope and Construction of O. 21, Rr. 74. and 85.*

Where a judgment-debtor had conveyed properties to another with a covenant that if he paid the sale amount before the 31st August 1914, the properties should be reconveyed to him and the right of the judgment-debtor under such agreement was put up for auction in execution of the decree and sold on the 25th August 1914, and the auction purchaser paid the deposit of 25 per cent under O. 21, R, 84 but failed to pay the balance within the 15 days and consequently the right of the judgment-debtor was put up for re-sale after the 31st August 1914 (the last date for reconveyance) and fetched a very low price, the first auction purchaser is bound to pay the deficiency in the sale price at the re-sale under O. 21, R. 71, of the Civil Procedure Code.

Per *The Chief Justice,* (Ayling, J. concurring.) The judgment-debtor's right to a reconveyance on the payment of a fixed sum before a stipulated day can be the subject of an effective sale in execution, even if the sale takes place less than 15 days before the stipulated date, though under O. 21, R. 85, the purchaser has 15 days to pay the balance, and the sale is not final until confirmed after not less than 30 days of the sale. These provisions were made *alio intuitu* and were not intended to have the effect of rendering the properties not liable to be sold under the above circumstances. The Court auction-purchaser could if necessary have procured the concurrence of the judgment-debtor in making the tender of the amount for reconveyance, without prejudice to the question of the confirmation of the sale and in that case would have been entitled to a charge on the property so released.

Per *Kumaraswami Sastri, J.* The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and the property re-sold should substantially be the same and that any difference will not matter, if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the purchaser's default.

*Venkatachellemayya Garu* v. *Neelakanta Girjee.* (*The Chief Justice, Ayling and Kumaraswami Sastri, JJ.*) ... ... ... 156

———**O. 33. Rr. 1, Explanation, 3 and 5 (e)**—*"Person," meaning of—Company—Right to sue* in forma pauperis—*Liquidator, financial condition of, immaterial—Agreement to remunerate liquidator for winding up company, if falls within the mischief of R. 5 (e).*

On proof of pauperism, a company represented by its liquidator, can be granted leave to sue *in forma pauperis* for the recovery of a debt due to

**C. P. Code**—*Cont.* PAGE

the company. The word "person" in the explanation to R. 1 of O. 33 of the Civil Procedure Code, is to be understood in the sense in which that term is defined in the General Clauses Act and includes a company or association or body of individuals whether incorporated or not.

Where a company represented by its liquidator applies for leave to sue *in forma pauperis*, the only question is whether the company is a pauper, and the financial standing of the liquidator is immaterial.

Where a Court or a Company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring the case within O. 33 R. 5 (e).

*Perumal Koundan* v. *Thirumalarayapuram Jananuhoola Nidhi Ltd.* (*Bakewell and Kumaraswami Sastri, JJ.*) ... ... 421

———**O. 33 R. 5 (d)**—*Application for permission to sue as a pauper—Doubtful question of limitation—Decision on, whether permissible.*

Order 33 Rule 5 (d) applies only to causes where the allegations of the petitioner do not show a cause of action and this should appear clearly on the face of the petition.

The Court is not justified in determining a doubtful question of limitation or hold an elaborate enquiry into doubtful and complicated questions of law at the stage contemplated by Order 33 Rule 5.

*Govindasami Pillai* v. *The Municipal Council, Kumbakonum.* (*Bakewell and Kumaraswami Sastri, JJ.*) ... ... 399

———**Or. 41 R (5) (3) (c)**—*Security for due performance of decree—Order for—Immoveable property given as security—Effect—Realisation of property—Remedy of decree-holder—Execution—Suit under S. 67 of Tr. of P. Act—C. P. C.—S 47—Applicability.*

Immoveable property given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Or. 41 R. (5) (3) (c) of the Code can be realised by the decree-holder in execution. There is no need in such a case that there should by anything in the nature of a mortgage suit for sale under S. 67 of the Transfer of Property Act.

Effect of immoveable property being given as security considered. *Sadasiva Pillai* v. *Ramalinga* L. R. 2. I. A. 219. folld.

*Subramania Chettiar v. Rajarajeswara Sethupathi.* (*Chief Justice and Kumaraswami Sastri, J.*) ... ... 84

———**O. 41 Rr. 5 and 6 (2)**—*Application for stay of sale—Whether lies in an appellate court.*

An appellate court has power under O. 41 R 5 of the Civil Procedure Code to stay the sale of immoveable property ordered by the lower court on an application made to such appellate court.

The inherent powers of the appellate court clearly recognised by O. 41 R. 5 cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing court by O. 41 R. 6 which rule seems to have been clearly intended in order that the executing court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor. *Kanniappa Chetty* v. *Manikavasakam Chetty* (1912) 23 M. L. J. 677. dissented from.

*Tribeni Sahu* v. *Bhagmat Bux* (1907) I. L. R. 34 C. 1087 and *Rama Prasad* v. *Anukul Chandra* (1914) 20 C. L. J. 125 ref. to.

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*Lakshmanan Chetty* v. *Palaniappa Chetty.* (*Sadasiva Aiyar and Napier, JJ.*) ... ... ... ... 470

———Or. 43 R. 1—Applicability to suits under Estates Land Act ... 309

———Sch. ii. S. 14 cl. (c) *Scope and Effect—Award—Validity—Illegality patent on face of Award—What is—Award based on erroneous view of law—Effect—English law considered.*

In a suit by a member of a Hindu family for partition of joint family properties, in which the defence was that plaintiff was born blind and was not under the Hindu law, entitled to any share, the parties referred to arbitrators all the questions of fact and of law in difference between them and the arbitrators decided that plaintiff was entitled only to a life interest in his share of the family properties. On objection taken to the validity of the award on the ground I, that it was illegal on the face of it because it proceeded on the erroneous view of law that, though plaintiff was not born blind, he was not entitled to his full rights in the family, *held* that the arbitrators having acted honestly and to the best of their judgment their award was not invalid under S. 14 cl. (c) of Sch. ii of the Code.

Scope of S. 14 cl. (c) of Sch. ii of the Code and the English law on the subject considered.

*Madepalli Venkataswami* v. *Madepalli Suranna* (*Seshagiri Aiyar and Napier, JJ.*) ... ... ... ... 323

———Sch. II, Rules, 14, 15 and 21—*Guardian of a minor referring minor's interests to arbitration—Guardian revoking submission—Nobody to protect the interests of the minor—Award passed, validity of—"Otherwise invalid" in r. 15, meaning of—Whether passing an award under such circumstances amounts to misconduct on the part of the arbitrator.*

Where the plaintiff sued the 1st defendant his brother and the 2nd defendant, the minor son of the 1st defendant for filing an award, partitioning their family properties and for a decree in terms of the award, and it is found that the next day after the submission the first defendant who was acting as the guardian of the 2nd defendant gave notice to the arbitrator revoking the submission and thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition, no one being there to watch the proceedings on behalf of the minor and to protect his interests, the award is not binding on the minor, and no decree can be passed on the award and the suit should be totally dismissed.

An award is not *ipso facto* invalid if it cannot be shown to be beneficial or advantageous to the interests of a minor whose claims are referred to arbitration.

*Per Abdur Rahim, J.*—It is open to a minor by a suit instituted either through a guardian or when he attains majority to set aside an award if he can prove that his guardian was grossly negligent or acted fraudulently in conducting the proceedings before the arbitrator.

The facts set out above bring the award passed under these circumstances under the class of awards "otherwise invalid" within the meaning of cl. (c) of rule 15 of the 2nd Schedule to the Civil Procedure Code.

The words "or being otherwise invalid" in clause (c), should not be read as *ejusdem generis* with the other cases mentioned in that clause and are not restricted to cases where an award is bad on grounds like

C. P. Code—*Contd.*. PAGE

want of jurisdiction; on the other hand, they are meant to include all cases of invalidity on grounds other than those mentioned.

*Per Oldfield*, J.—Arbitrators will fail in their clear duty and be guilty of misconduct if they do not secure for each party an opportunity to present his case.

The duty of the arbitrator in the circumstances mentioned above is to refrain from passing an award so long as they are deprived of the power of passing a just one and either to adjourn the proceedings in case a change in the representation of the minor is probable or if one is not probable within the period specified for the return of the award, to refuse to act. The arbitrator's failure in this duty amounts to misconduct.

Under S. 21 (1) of Schedule II of the Civil Procedure Code, the court must be satisfied that the matter has been referred and must also enquire into the validity of the reference. In such an enquiry, the question of the beneficial nature of the reference to any minor concerned can be raised

*Lakshminarayana Tantri* v. *Ramachandra Tantri* (*Abdur Rahim and Oldfield, JJ.*) ... ... ... ... 71

**Consolidation**—*Power of Appellate Court—Inherent power—Exercise of discretion in ordering consolidation—No request for consolidation in the lower Court—Whether consolidation can be ordered in the Appellate Court—Land Acquisition Act, Ss. 12, 18 and 20—A single notice under S. 12 (2) and a single objection by the claimant—Splitting up of the awards by the District Court—Right of claimant to treat them as a single award.*

An appellate Court has the inherent power of consolidating appeals before it and the power under S 151 of the Civil Procedure Code may be invoked for that purpose.

Courts should see whether a case is a fit one for consolidation, as if consolidation is allowed, the Crown will be deprived of the public revenues by the reduction in the Court fees payable by the appellants.

Where only one notice was served on the claimants under S. 12 (2) of the Land Acquisition Act and there was only one objection by them, there would *prima facie* be a single award. The fact that in the arbitration proceedings before the District Court, the award was split up ought not to be allowed to prejudice the right of the appellants to treat the award as one and they would be equitably entitled to consolidation.

Where the splitting of the awards by the referring officer or by the Court may not have been known to the parties or where there was no occasion for the claimants to take any objection at the hearing in the lower Court, the claimants can treat the awards as one and appeal against them in one appeal.

*Vengu Naidu* v. *The Deputy Collector of Madura Division.* (*Phillips, J.*) ... ... ... ... 279

**Contract**—*Stranger — Right of suit—English Law — Applicability—Malabar Law—Kanom—Grant of Melcharth to third party—Provision for payment of barred arrears of rent to Jenmi after redemption—Assignment of melcharth to kanomdar—Validity—Jenmi's suit to enforce provisions of, against Kanomdar requiring assignee to pay arrears to Jenmi—Maintainability—Limitation Act, Art. 92; Sec. 18—Applicability*

Plaintiff, who had granted a kanom to the 2nd defendant in 1893, executed in 1904 a melcharth in favour of the 1st defendant by which the latter became entitled to redeem the 2nd defendant on the expiry of his kanom and to hold the lands himself on a fresh kanom for 12 years commencing from the date of his recovering possession of the properties. The kanom debt payable to the 2nd defendant on redemption was subject to reduction by the amount of the arrears of rent due from the 2nd defendant to plaintiff under the kanom even though a suit for the arrears had become barred and the 1st defendant was required on redemption to deduct this amount from the kanom debt and pay it over to plaintiff. By the melcharth the 1st defendant was also required to pay rent from the date of the expiry of the term of the kanom in favour of the 2nd defendant even if there was delay in getting possession. The 1st defendant did nothing till 1909 when he assigned his rights under the melcharth to the 2nd, stipulating at the same time that the latter should pay plaintiff the arrears of rent due under the kanom which he had bound himself to collect and pay. The melcharth was recognised by plaintiff by a notice in 1912 demanding payment of the arrears from the 2nd defendant. In a suit instituted in 1918 by plaintiff against defendants for payment of arrears of rent from 1896-1905 and 1910-18,

*Held per Chief Justice and Kumaraswami Sastri, J.* (*Bakewell, J.*, dissenting) by virtue of the assignment of the melcharth, the amount of the arrears of rent was money had and received by the 2nd defendant for plaintiff's use and plaintiff was entitled to sue him for its recovery; and no portion of the plaintiff's claim was barred.

*Per Chief Justice* and *Bakewell, J.* (*Kumaraswami Sastri, J.* dissenting). The rule of English law that a contract cannot be enforced by a person who is not a party to it is applicable to India.

*Jamna Das v. Ram Autar Pande* (1911) I. L. R. 34 A. 63, (P.C.) followed.

Per *The Chief Justice.*—Even if the melcharth contained an implied covenant against assignment, Plaintiff could not by reason of his recognition of the assignment to the 2nd defendant question its validity.

By reason of the assignment 2nd defendant became bound to redeem the old kanom and to hold the demised lands for a further term for the old kanom debt less the amount of arrears which were due at the date of redemption, and, plaintiff when he came to know of the assignment, became entitled to insist on his so redeeming the old kanom and to treat the arrears as money in the 2nd defendant's hands had and received to plaintiff's use and to recover it under Art. 62 of the Limitation Act and he must be taken to have exercised that right when he sent the notice of demand in 1912.

Even if the redemption should be treated as having taken place on the date of the assignment of the melcharth, under Art. 62 read with S. 18 of the Limitation Act, time would not run against plaintiff so long as he was kept in the dark as to the manner in which his rights had been affected by the assignment of the melcharth.

Per *Kumaraswami Sastri, J.*—Inasmuch as plaintiff recognised both the melcharth and the assignment as valid and subsisting transactions at the date of the suit, the melcharth was not at the date of the assignment invalid and inoperative by reason of the failure of the 1st defendant to

**Contract**—*Contd.* PAGE

redeem the kanom, and the rights of the parties must be dealt with on the footing that the 2nd defendant remains liable for all legal consequences that would flow from his being both the kanomdar and the assignee of the melcharth.

It is not open to the 2nd defendant to claim the advantages which he got by reason of the assignment of the melcharth without performing the obligations imposed by it and plaintiff was entitled to sue on the contract between the defendants.

Whether the claim of plaintiff is based on his right to sue on the arrangements evidenced by the melcharth and its assignment or on the ground that the kanom must be deemed to have been redeemed when the assignment of the melcharth was assented to by plaintiff, his claim is not barred inasmuch as in the former case he would have 6 years within which to file the suit and in the latter 3 years from the date of his assent.

Per *Bakewell, J.*—The demise under the melcharth was not intended to take effect until the 1st defendant recovered possession of the mortgaged properties from the 2nd and the assignment of the benefit of the melcharth was in breach of its terms and passed nothing to the 2nd defendant and as against him plaintiff had therefore no remedy under the melcharth.

Even if the melcharth is held to come into operation immediately upon the determination of the term granted by the kanom to the 2nd defendant, the 1st defendant's obligation to pay a sum of money determined by the arrears of rent due under the kanom formed part of the consideration for the grant of the melcharth and was not rent due under it and the agreement to pay it does not run with the land so as to be binding upon the assignee, the 2nd defendant.

Plaintiff's remedy for rent for the earlier period is barred, but in a suit for redemption he would be entitled to have it credited to him in taking an account as between the mortgagee in possession and the mortgagor; the arrears of rent are not a charge on the mortgage moneys and cannot be said to be money had and received by the 2nd defendant for the use of plaintiff within the meaning of Art. 62 of the Limitation Act.

*Mannath Veettil Itti Panku Menon* v. *Thazheth Meladem Dharman Achan.* (*The Chief Justice, Bakewell and Kumaraswami Sastri, JJ.*) ... 193

**Contract Act**, Ss. 23, 65—*Marriage brocage agreement—Sum of money paid under—Suit to recover—Whether lies and under what conditions.*

Money paid by one of the parties to a marriage brocage agreement to the other can be recovered before the whole or a substantial portion of the agreement is performed.

The right to recover a sum of money or anything else paid under an unlawful agreement does not depend upon whether the transfer of the advantage under it to the other party was merely ostensible or was intended to be real.

The distinction under this head drawn in *Ledu Coachman* v. *Hira Lal Singh* (1916) I. L. R. 43 Cal. 115, between agreements contrary to law or public policy and others which would merely have an unlawful object is not warranted by S. 23 of the Contract Act or by the English cases.

S. 65 of the Contract Act would not apply to such a case, as the words "discovered to be void" in that section refer to an agreement which

**Contract Act**—*Contd.* PAGE

was void *ab initio* but not then known to the parties to be so, and do not refer to an agreement of which illegality must be taken to have been always known to the parties.

Where the plaintiff sues to recover a sum of money and he does not refer to the unlawfulness of the agreement under which it was paid, the defendent can rely on the unlawfulness of agreement as a defence only if he further alleges and proves that the unlawful agreement or a substantial part of it has been performed.

Per *Bakewell*, J.—In India, marriage is not generally a matter of contract between the parties thereto, but is a status or condition imposed upon them by persons who are under a social duty to do so. Those who undertake this duty must have regard solely to the interests of their wards and must not stipulate for a profit for themselves.

*Srinivasa Aiyar* v. *Sesha Aiyar.* (*Oldfield and Bakewell*, JJ). ... 282

———S. 30—Bombay Act III of 1865, Ss. 1 and 2—Wagering Contracts.—What are—Pakka Adatias—Their position ... ... 305

———Ss. 30 and 65—*Wagering contract—Money deposited as security for performance of—Right to recover*

Money deposited by the plaintiff with the defendant as security for the performance of his part of a wagering contract is recoverable by the former, not under the provisions of S. 65 of the Contract Act, but by virtue of the general principle of law that a person whose hands have not been tainted by corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another.

*Ledu Coachman* v. *Hiralal* (1915) I. L. R. 43 Cal. 115. *Gulab Chand* v. *Lalubhai* (1909) I. L. R. 33 Bom. 411. *Haribansraju* v. *Ratanji* (1913) I. L. R. 38 Bom. 249. referred to ... ...

S. 65 of the Contract Act has no application to a case where the contract is *ab initio* void. *Ledu Coachman* v. *Hiralal* (1915) I. L. R. 43 Cal. 115. *Parshotam Veribhai* v. *Chatrasanghi*, 1916) I. L. R. 41 Bom. 546. *Srinivasa Iyer* v. *Sesha Iyer*, (1917) 34 M. L. J. 212, Referred to

*Srikakolapu Venkataraju* v. *Gudivada Ramanujam.* (*Seshagiri Aiyar and Napier*, JJ.) ... ... ... ... 561

**Court-Fees Act (VII of 1870) S. 7 (V) (b) and (d)**—*Ryotwari land—Suit for possession of a plot of land forming a portion of a survey number but not constituting a definite share thereof nor separately assessed as such—Market value*

In a suit to recover possession of a specific plot of land forming part of a distinct revenue-paying area but not constituting a definite share thereof nor separately assessed to revenue by itself, *held* that court-fee should be paid on the market value of the land in suit under S. 7 (v) (d) of the Court Fees Act.

*Godavarty Sundaramma* v. *Godavarty Mangamma*, (*Ayling and Seshagiri Aiyer* JJ.) ... ... ... ... 558

———S. 7 (5) and (6)—Pre-emption—Suit to enforce right of—Court Fee ... ... ... ... 397

**Criminal Case** — *Trial — Complaint of offences triable one as "summons case" and the other as "warrant case"—Procedure—Single trial—Order discharging accused—Effect—Fresh complaint in respect of same offences committed in same transaction—maintainability—Cr. P. C. Ss. 247, 559—Applicability.*

**Criminal Code**—*Contd.* PAGE

Where, in a case in which a complaint was made of offences under Ss. 352 and 504 I. P. C. committed in the course of one and the same transaction, the complainant was absent on the date fixed for the case and the Magistrate discharged the accused by an order which stated, Complainant absent. Accused discharged', *held* that the order did not amount to an acquittal of the offence under S. 352 Penal Code, and that it was not a bar to a fresh complaint in respect of the same offences committed in the same transaction

*Per Abdur Rahim*, J :—Where two offences are alleged to have been committed in the course of the same transaction, one of which is triable as a warrant case and the other as a summons case, the proper procedure ordinarily speaking is to have one trial and the case ought to be treated for purposes of the procedure to be followed as a warrant case

*Per Napier, J.* :—Unless the Magistrate chooses to separate the two offences which are complained of and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him in one case is one punishable by six months or less does not make that part of the trial a summons case and it is not, in such a case, open to the Magistrate to apply the procedure applicable to a summons case, namely, the procedure under S. 247 of the Code of Criminal Procedure.

*Raghavalu Naicker* v. *Singaram*. (*Abdur Rahim and Napier*, JJ.) ... 369

**Cr. P. Code, S. 195** (*b*) — *Sanction to prosecute — Grant of — Jurisdiction—Offence of perjury committed before Sub-Magistrate—Sanction by Joint Magistrate hearing appeal from Sub-Magistrate's order on application for sanction—Validity—Joint Magistrate not superior Court—"Offence committed in or in relation to a proceeding in a Court" —Meaning.*

Where, on an application to a Sub-Magistrate for sanction for perjury with reference to a statement in the evidence of a person examined before him, he granted sanction with reference to another statement and his order was on appeal set aside by the Joint Magistrate who, however, granted sanction with reference to the very statement in respect of which sanction had been applied for before the Sub-Magistrate, *held* that the Joint Magistrate had no jurisdiction to grant sanction because the offence of perjury was not committed in his court or in relation to a proceeding in his Court within the meaning of S. 195 cl. (b) of the Code of Criminal Procedure nor was he a superior Court within the meaning of the section. *Bhadesa Tiwari* v. *Kampta Prasad* (1912) I. L. R. 35 All. 90 dissented from.

*Kompella Anantaramayya* v. *Chikkatla Tukkadu*. (*Abdur Rahim and Napier, JJ.*) ... 404

——**Ss. 247, 259**.—Applicability ... 369

——**S. 345**.—*Compounding offences—Composition out of Court—agreement resiling from complaint before hearing, effect of—Composition before complaint is laid or proceedings taken in court, if valid.*

The composition referred to in S. 345 of the Criminal Procedure Code is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the case comes on for hearing before the Court. Once there has been a composition of an offence compoundable under the Criminal Procedure Code, the matter is at an end and the person injured cannot afterwards effectively resile from the agreement. If

**Cr. P. Code**—*Contd.* PAGE

he chooses to do so, it is for the Court to enquire from the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under S. 345.

*Kanni Rauther* v *Inayathulla Saheb* (1915) I. L. R, 39 Mad. 946 foll.

A lawful composition of a compoundable offence can be made even before a complaint is laid or proceedings are taken in court, by or at the instance of the injured person. As regards offences which can be compounded only with the permission of the court, the operation of the composition is suspended until the court sanctions it. *Keir* v. *Leeman* (184) 6 Q. B. 308 ref.

*Kumaraswami Chetti* v. *Kuppuswami Chetti*. (*Abdur Rahim and Napier*, JJ.) ... ... ... ... 217

———**S. 517**—*Scope of—The Madras Towns Nuisances Act (III of 1889) Ss. 6 and 7 Conviction under—Sovereigns found in accused's pocket and waist-cloth—No proof that sovereigns had been staked—Confiscation of, illegal.*

The fact that money is found in the pocket or waist-cloth of a person engaged in gambling does not, by itself, lead to the inference that it has been staked. Where a magistrate convicted the accused of offences under Ss. 6 and 7 of the Madras Towns Nuisances Act and at the same time made an order for the confiscation of four sovereigns found in their pocket and waist-cloth and there was no evidence that the sovereigns had been actually staked, *held* that the order of confiscation was illegal.

Per *Ayling, J*, S. 517 of the Code of Criminal Procedure, wide as it is, does not confer on a Court an absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence.

*Appaji Iyer, In re.* (*Ayling and Phillips, JJ.*) ... ... 253

**Custom**,—*proof of— burden of proof where custom set up— Alleged presumption in favour of custom—Bombay Regulation IV of 1827, S. 26—Punjab Laws Act, 1872 (Act IV of 1872) S. 5.—Family customs, recognised in India—Requisites to legal recognition of custom—Antiquity and certainty—Instances adduced in proof of custom—May be useful even though all the requisite conditions are not proved in every case.*

When either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply.

No presumption in favour of custom as against the general or personal law is created by clauses such as S. 26 of Bombay Regulation IV of 1827 or S. 5 of the Punjab Laws Act : it is only when the custom is proved that it is made the rule of decision.

Mr. Justice Robertson's judgment in *Daya Ram* v. *Sohel Singh and others* (1906) 41 P. R. 390 at p. 410 (F. B.) approved,

Custom binding inheritance in a particular family, although foreign to the spirit of English law, is recognised in India : and if the custom is well established in one particular family, the fact that it might not apply to other families will not make it void for uncertainty.

Special usages modifying the ordinary law of succession must be (1) ancient (2) invariable (3) established to be so by clear and unambiguous evidence.

**Custom**—*Contd.* PAGE

Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

The best evidence as to custom of inheritance is generally found in connection with the division of land, and Revenue Records may therefore be of great value.

*Mir Abdul Hussain Khan* v. *Mussammat Bibi Sona Dero.* (*Lord Buckmaster*) P. C. ... ... ... ... 48

**Customary Law**—*South Canara—Kuzhikanam lease — Lessee in possession after expiry of the term—Right to improvements—Possession of lessee, not adverse—Notice to quit, if necessary.*

Under the customary law of South Canara, as in Malabar, a *Kuzhikanam*-lessee is entitled to remain in possession of the demised land after the expiry of the term, until he is paid the value of his improvements. Such possession is not adverse to the lessor or persons claiming under him. Where a kuzhikanam tenant continues in possession after the expiry of the term awaiting the payment of compensation, he is not entitled to a notice to quit unless he is holding over as a tenant, with the consent of the landlord.

*Thema v. Kunhi Pathuma.* (*Seshagiri Aiyar and Bakewell, JJ*) ... 128

**Declaratory decree**—*Alienation by Hindu widow— Presumptive heir —Declaration to protect his interests whether, permissible—Specific Relief Act,* 1877 (*Act I of* 1877) *S.* 42, *Illustration* (*e*).

When a deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed.

*Janaki Ammal v. Narayanasami Aiyar* (1916) L. R. 43 I. A. 207=31 M. L. J. 225=39 M. 634, *distinguished.*

*Saudagar Singh v. Pardip Narayan Singh.* (*Lord Parker*) P. C. ... 67

**Decree.**—Security for due performance—Realisation of—Remedy of decree-holder. Distinction between case where money is given as security and one in which immoveable property is given as security ... 84

——*Setting aside-Fraud-Tendering of false evidence and suppression of evidence—Suit to set aside a decree, if maintainable.*

A suit will not lie to set aside a judgment on the ground that it was obtained by false evidence tendered at the trial and by the suppression of evidence.

*Venkatappa Naick v. Subba Naick,* (1905) I.L.R. 29 M. 179 overruled. *Chinnaya* v. *Ramanna* (1913) I. L. R. 38 M. 203. *Munshi Mosuful Hug* v. *Surendra Nath Ray* (1912) 16 C. W. N., 1002. *Janki Kuar* v. *Lachmi Narain* (1915) I. L. R. 37 A. 535, relied on.

*Kadirvelu Nainar v. Kuppusami Naicker* (*The Chief Justice, Sadasiva Aiyar and Spencer, JJ* ) F. B. ... ... 590

**Deed**—Construction—Release when operative as a conveyance ... 258

**Easements Act, S.** 15 — *Easement — Acquisition by prescription — Servient tenement owned by Government—Exercise of easement in respect of, for 30 or 40 years—Assignment of property by Government*

Easement Act—*Contd.* PAGE

*to private individual—Effect on rights of parties—" Belongs to Goverment" in last para—Meaning...* ... ...

The words " belongs to Government " in the last paragraph of S. 15 of the Easements Act refer, not to the time of suit, but to the time during which the easement is enjoyed.

Where, property belonging to Government and in respect of which an easement had been exercised by A only for 30 or 40 years, was assigned by Government to B, a private individual, *held* that the assignment had not the effect of rendering the easement absolute as against B on the ground that the 30 or 40 years' enjoyment would be sufficient as against him under S. 15 of the Act.

*Semble*, Where the 60 years' period has nearly expired, during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee.

*Srinivasa Upadya* v. *Ranganna Bhatta.* (*Ayling and Phillips, JJ.*)... 396

**Estates Land Act** — *Suit in Revenue Court under — Appeal to District Court—Order of that Court directing return of plaint for presentation to proper Court—Appeal to High Court—C. P. Code Or. 43, R. 1—Applicability to suits under Estates Land Act—Practice —Appeal under Or. 43, R. 1 converted into revision under S. 115 of the Code—Jurisdiction of Revenue Court—Conditions of—Defendant's plea if will affect jrisdiction* ... ... ...

Order 43, R. 1 of the Code of Civil Procedure, 1908, which gives a right of appeal against an order passed under O. 7, R. 10 thereof is inapplicable to suits filed in Revenue Courts under the Estates Land Act.

Where in an appeal in a suit under the Estates Land Act the District Court held that the suit was not cognisable by the Revenue Court and directed the plaint to be presented to the proper Court, *held*, that no appeal lay to the High Court against the order of the District Judge.

Their Lordships however treated the appeal as a Revision Petition under S. 115 of the Code.

When the allegations in the plaint bring the case within S. 77 of the Estastes Land Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise The fact that the Court may have to go into complicated questions will not affect the jurisdiction of the Revenue Court.

*Polemora Thammiah Naidu* v. *Sri Maharani Lady Gajapathi Rao* (1910) M. W. N. 431. foll.

*Venkata Ramayya* v. *Chakali Veeraswamigadu.* (*Spencer and Kumaraswami Sastri, JJ.*) ... ... ... ... 309

**Evidence Act, Ss. 33 and 165**—*Suit to enforce registration of a will—Judgment based on evidence adduced before the registering authorities and treated as evidence in the suit by consent of parties—Judgment unsustainable*

In a suit under S. 77 of the Registration Act to enforce registration of a will which the Registrar had declined to register, the court below based its judgment solely on the evidence adduced before the registering authorities but which was treated as evidence in the suit by the consent of both the parties. There was nothing to show that the conditions

**Evidence Act**—*Contd.* PAGE

prescribed by S. 33 of the Evidence Act existed so as to justify the reception of the evidence. Nor was it shown that the evidence was relevant under any other section of the Evidence Act.

*Held* that, having regard to the stringent provisions of S. 165 of the Evidence Act, the judgment of the court below was unsustainable as it was based on irrelevant evidence

*Sri Rajah Prakasarayanim Varu v. Venkata Row* (1912) I. L. R. 38 M 160, dissented from.

*Ponnusami Pillai* v. *Singaram Pillai.* (*Ayling and Seshagiri Aiyar, JJ.*) ... ... 526

**Foreign Judgment**—Validity—Judgment based on erroneous view of law —Judgment opposed to natural justice—What is ... ... 295

**Godaveri Agency Rules, Rr. 8 and 16**—*Dismissal of suit for default by Assistant Government Agent—Appeal to Agent—Order of Agent directing Assistant Agent to restore the suit to his file and try the same—High Court—Revision.*

A plaintiff whose suit was dismissed for default by the Assistant Government Agent appealed to the Government Agent of the Godaveri District, who without hearing the defendant, directed the suit to be restored to the file of the Assistant Agent, to be heard and disposed of according to law. The defendant preferred a petition to the High Court under R. 8 of the Agency Rules, to direct the Agent to review his judgment. *Held*, that the order of the Agent was not a decree within the meaning of R. 8 and therefore the petition to the High Court was incompetent. *Sri Pedda Vikrama Deo Garu* v. *The Maharaja of Jeypore* (1916) 4 L.W. 499, followed.

The proper remedy of the petitioner was to submit a petition to Government under R. 16 of the Agency rules and the Government might, if necessary refer the petition to the High Court.

*Venkata Nagabhushanam* v *Mahalakshmi* (*Abdur Rahim and Kumaraswami Sastri, JJ.*) ... ... ... 524

————**Rr. 10 and 16**—*Order by Agency Munsif in execution of a decree of the Government Agent's court—Appeal*

The Government agent acting under Rule 10 of the Godaveri Agency Rules employed a Munsif to execute a decree of the Agent's court. The Agency Munsif made an order in the course of the execution proceedings against which the decree holder filed an appeal in the usual form of a petition to the Government, under R. 16 of the Agency Rules.

*Held*, that the order of the Agency Munsif was not a decree, the provisions of the Civil Procedure Code not being applicable to the case, and therefore no appeal lay against the order.

The order of the Agency Munsif could not, in law, be said to be a proceeding of the Government Agent so as to attract the operation of Rule 16 of the Agency Rules The proceedings of a subordinate officer of a court of justice do not become the proceedings of the court itself unless the statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the court and adopted or approved of by him.

*Maharaja of Jeypore* v. *Nila Devi Pata Mahadevi Garu* (1902) I. L. R. 27 M. 109=13 M. L J. 151. distinguished

*Manyam Mahalakshmamma Garu* v. *Muchika Appalaraju.* (*Sadasiva Aiyar and Bakewell, JJ.*) ... ... 473

**Godaveri Agency Rules**—*Contd.* PAGE

The desirability of a revision of the Agency Rules, pointed out.

**Guardian and Ward**—Bond by guardian—liability of ward under—Bond for proper purposes—Effect ... ... ... 177

———Ward entitled to mere *spes successionis*—Guardian's disposal of—Validity ... ... ... ... 298

**Guardian ship**—Testamentary guardian—Appointment by father or other manager in respect of joint family property of other members—Validity ... ... ... ... 381

**Hindu Law**—*Adoption—Consent of sapindas subsequently given, cannot validate—Deed—Construction—Release when operative as a conveyance—Pleadings—Amendment of—Events subsequent to the institution of the suit—Power of Court to take cognizance of, and grant relief accordingly—Suit for redemption claiming as heir—Relief on the strength of a conveyance from the true heir obtained by plaintiff subsequent to the institution of the suit, if can be granted.*

The subsequent assent of the *sapindas* will not validate an adoption by a widow who had no such assent at the time of the adoption.

A document though styled a release can be treated as a conveyance if it appears clearly that the intention of the executant of the document was to transfer his rights.

In 1914 plaintiff brought a suit for redemption of a mortgage executed by the widow of the last male owner, alleging that he was the son of a person adopted by the widow. The defendants in their written statement questioned the legality of the adoption of the plaintiff's father, whereupon the plaintiff obtained a conveyance of all his rights from the person who, but for the adoption, would be the heir of the last male owner on the death of the widow in the year 1902; and in a supplemental written statement filed by him plaintiff relied on the conveyance as giving him a right to redeem. An issue was also raised on the plea set up by the plaintiff in his supplemental written statement. It was found that though his adoption was invalid in law, the plaintiff's father had been in possession of the estate as the adopted son of the last male owner and that the plaintiff went into possession of the properties on the death of his father, without any objection from the reversioners; that the plaintiff had instituted the suit for redemption in the belief that his right was unquestionable; and that when plaintiff's title was questioned by the defendants he put himself right by obtaining a conveyance from the next reversioner. It was also found that at the time when the additional written statement was put in by the plaintiff and for a long time thereafter, the right to redeem the mortgage would not be barred and that otherwise there was no prejudice to the defendat by allowing the plaintiff to amend his claim. *Held*, that in the circumstances of the case, the Court should grant the plaintiff a decree for redemption on the title set up by him in his additional written statement without driving him to a fresh suit.

*Kishandas Rupchand* v. *Rachappa Vithoba*, (1909) I L. R. 33 B. 644 Referred to.

*Mathura Mohan Saha* v. *Ram Kumara Saha and Chittagong District Board* (1915) I. L. R. 43 C. 790, 817 *Rangayya Reddy* v. *Subramania Iyer*, (1917) I. L. R. 40 M. 365 Distinguished.

*Doraisawmi Pillai* v. *Chinnia Goundan.* (*The Chief Justice and Kumaraswami Sastri, J.*) ... ... ... ... 28

———*Adoption by widow—Consent of Sapindas—Revocation—Validity—Conditions—Propriety of reasons for revocation if and when can be scrutinised by Court—lapse of time after consent—Death of consentor—Effect.*

*Held*: Sapinda a who has voluntarily and *bona fide* given his consent to an adoption by a Hindu widow cannot arbitrarily withdraw his consent. Where a Sapinda who has so given his consent professes to revoke it without assigning any reasons, it would be wrong for the Court o speculate as to what might have led him to act in the way he did.

Where a Hindu widow who has inherited the property of her son makes an adoption, she will be divested by her adopted son of the inherited property, even though it constituted the self-acquisition of the deceased son.

*Per Seshagiri Aiyar, J.*; *Semble.* It is open to a Sapinda to revoke his consent before it is acted upon.

Neither mere lapse of time without more nor the death of the consenting Sapinda, would invalidate the authorisation.

*Quaere* whether, when a Sapinda purporting to revoke his consent acts honestly and puts forward grounds which would satisfy a person of ordinary prudence that he was acting to the best of his knowledge and belief, it is open to Courts to scrutinise his reasons.

*Suryanarayana* v. *Sunkuru Ramadoss.* (*Ayling and Seshagiri Aiyar, JJ*). ... ... ... ... ... 87

———*Debts—Son's liability for father's debts—Liability of ancestral joint family property—Claim of right based on a general Rule subject to exceptions will not be entertained by Privy Council unless raised in Courts below—Right of creditor to proceed against ancestral property of Hindu joint family for father's debts—May be waived by his own election to proceed against his debtor only—Symbolical possession when Sufficient to interrupt adverse possession.*

The general rule of Hindu law is that the ancestral property in a joint family may be made liable for the father's debts, unless those debts are shown to have been for an illegal or immoral consideration: but this rule is not always applicable. *e. g.*, the creditor's conduct may evidence his intention not to resort to any such right.

Where therefore it appeared that the interest of the father had been taken in execution, but it was sought in the Privy Council to extend that interest beyond his life on the ground that his sons were liable under the aforesaid rule:

*Held*; that such an argument was no longer open to the attaching creditor, as there might have been an answer to it if it had been raised in the Courts below.

Symbolical possession is sufficient to interrupt adverse possession if the adverse possessors are parties to the proceedings in which it is given. *Juggobandhu Mukerji* v. *Ram Chandra Bysack* (1880) I L. R. 5 Cal; 584 (F. B.) followed

*Thakur Sri Radha Krishna* v. *Ram Bahadur*, (*Lord Sumner*), P. C ... 97

———*Grants for inheritable purposes—Private charities—Devolution of the right of management—Rule where the grant itself is silent.*

The general rule of Hindu law is that the right of management of private charities passes to the natural heirs of the original grantee, and

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if there is no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing members of the family before partition or in turn by the several heirs after partition.

But this rule does not apply (1) when there is an express provision to the contrary in the original grant, or (2) when there is a sufficient indication in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the founder's purpose.

A Hindu soveriegn granted certain lands to S. his guru or spiritual preceptor, some without condition, and others for specified religious purposes. The original guru's descendants in regular succession filled this office and enjoyed and managed the lands. The Raj was escheated. The then guru, who was the first to leave more than one son, subsequently died leaving three sons. The eldest of the three was installed as guru. Thereafter one of his younger brothers sued for a share in the non religious properties and in the management of the religious properties.

*Held*, that as regards the non-religious properties there was nothing to take their descent out of the ordinary rule of inheritance and that plaintiff was entitled to partition: but that as regards the religious properties it was the founder's intention that they should be administered by the guru as head of a *mutt*, an office not divisible among the members of a family, and this being so, the Indian Courts had no jurisdiction to settle a scheme; the only object of which would be to take away the sole power of management from the eldest son.

*Jafar* v. *Aji* (1864) 2 Mad. H C. R 19. and *Trimbak* v. *Lakshman* (1895) I. L. R. 20 B. 495. approved.

*Sri Sethuramaswamiar* v. *Sri Meruswamiar*. (*Sir Walter Phillimore*) P. C. ... ... ... ... ... 180

———Guardianship—right to Step-mother ... 177

———*Joint Family—Father and manager—Bond in favour of—Discharge of liability under—Payment during life-time of father to one of his sons only—Effect—Payment to one of heirs of the promisee under a bond—Validity.*

Payment to one of the Co heirs of a promisee under a bond does not discharge the promisor from his liability to pay under it. This principle is applicable to cases of payments made to a junior member of a Hindu family during the life-time of its manager in whose favour the bond was executed.

*Held*, that the liability of the obligor under a bond executed in favour of a Hindu father, who was also the manager of the joint family of himself and his sons, was not discharged by payment made, during the life-time of the father, to one of his sons only

*Aukalamma* v. *Bellam Chenchayya* (*Seshagiri Aiyar and Napier, JJ.*)... 815

———Joint family—Manager—Partnership between him and stranger—Dissolution—Right of junior members to sue for—Partition among members of family—Effect ... ... ... 271

———Joint Family—Partition suit—Barred debt due by some members to others—Claim to—Maintainability ... ... ... 32

——— *Mitakshara—Joint family-Self-acquired property—Gains obtained from an education received at the expense of the joint family—Are*

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*they partible—" Science acquired at the expense of ancestral wealth" Special and general eduction.*

Although the Mitakshara lays down that " what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father", this does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self-acquired property.

*Metharam Ramrakhiomal* v. *Rewachand Ramrakhiomal (Sir John Edge)*, *P. C.* ... ... ... ... 327

————*Mitakshara—Mortgage of joint property by manager who is not the father— Burden of proving necessity—Whether a mortgage without necessity binds mortgagor's own share.*

The mortg age of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed if it can be shown that resonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage.

*Narain Prasad* v. *Sarnam Singh* (1917) L. R. 44 I. A. 163=33 M. L. J. 39=39 All. 500 followed.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a joint family, mortgaged three joint villages for Rs. 3,000 to pay the Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1, 698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance.

*Held*, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound.

*Anant Ram v. The Collector of Etah.* (*Lord Buckmaster*).(P. C.) ... 291

————*Partition—Filing of plaint for partition by next friend on behalf of minor co-parcener—Whether effects severance in status—Death of minor after filing of plaint but before written statement is filed—Eeffect of—Whether cause of action survives to the mother as the legal representative of the minor.*

Where a suit was instituted on behalf of a minor co-parcenor for partition of the joint family property, and the minor died after the filing

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of the plaint but before the filing of the written statement, and the mother of the minor plaintiff applied for permission to be brought on the record as his legal representative and to continue the suit.

*Held*, that the filing of the plaint did not effect a severance of the joint status of the family and the mother was not entitled to continue the suit.

The option vested in each individual member of a Hindu family to effect a severance of status cannot be excercised by another acting as next friend on his behalf.

*Chelimi Chetti* v. *Subbanna*. (*Abdur Rahim and Oldfield, JJ.*) ... 218

———*Partition Deed—Construction—Division of some items of joint family property—Division in status—Presumption*

A partition-deed entered into between a Hindu father and his son, after reciting that they had till then lived as members of a joint family and that owing to differences between the women in the house it became necessary to effect a partition, proceeded to divide the joint family properties between the sharers, except the outstandings which to the knowledge of both the parties were considerable and to which there was no reference in the partition deed.

*Held*, on the construction of the partition deed that the father and son became divided in status and that the outstandings therefore ceased to be their joint family property.

*Per Chief Justice*;—The mere fact that the members of a joint Hindu family execute a document dividing particular items of property does not raise a presumption that they intended to become divided in status. If such a presumption is to be raised there must be something else in the document to raise it.

*Per Seshagiri Aiyar, J.* : Once a partition is proved, the presumption arises that it effected a complete severance of interest

*Vydianatha Iyer* v. *Aiyaswami Aiyar* (1908) I. L. R. 32 M 191 : 19 M. L. J 91 *Anandibai* v *Hari Suba Pai* (1911) I L. R. 35 B. 293 relied on. *Subba Reddi* v. *Alagammal* (*The Chief Justice and Seshagiri Aiyar, J* ) ... ... ... ... ... 596

———*Permanent blindness after birth—Exclusion from a share of the family property* .

Under Hindu Law blindness, to causeexclusion from inheritance must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance.

The rule laid down in Rajkumar Sarbdhikari's Hindu Law of Inheritance. p, 956 adopted by the Board.

*Mohesh Chunder* v. *Roychunder Mohun Roy* (1871) 14 Ben. L. R. 273. and *Murarji Gokuldas* v *Parvatibai* (1876) I L R. I. B 177. approved.

*Mussumat Gunjeshwar Kunwar* v. *Durga Prasad Singh*. (*Sir John Edge.*), P C. .... ... ... ... 1

——— Religious endowment Private charities—Right of management of Devolution of—Law applicable ... ... ... 130

———*Right of a reversioner to property held by a female owner—a mere spes successionis—Not assignable or transferable—not capable of being dealt with by the guardian of a minor.*

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Hindu reversioner has no right or interest *in presenti* in the property which a female owner holds for her life until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes only on her demise, until then it is mere *spes successionis*. His guardian if he happens to be a minor cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

*Amrit Narain Singh* v. *Gaya Singh*. (Mr. *Ammeer Ali.*), P. C. ... 293

——*Surrender by widow—nature and essentials of—Surrender to a daughter's son with consent of daughters if valid—Alienation by guardian of minor—Suit by minor after attaining majority to recover possession—Limitation Act, Sch. II, Art.* 44.

The rule that a surrender by a Hindu widow, to be valid, must be of the whole life-estate, simply means that she must reserve nothing for herself. The gift of a portion of the estate to a daughter in consideration of her past and future protection of the widow would not invalidate the surrender

There may be a valid surrender to a daughter's son with the consent of the daughters (the intervening life-estate holders).

A surrender is not a conveyance of any right by the widow to a reversioner but only an extinguishment of her rights so that the rights of the reversioner vest at once. The reversioner gets the estate in his own right, and not because anything is conveyed to him by the widow, her surrender being tantamount to her civil death.

*Mulugu Kotayya* v. *Mudigonda Chandra Mowli Sastri* (1916) 31 M. L J. 406 foll.

No registered instrument is necessary for a surrender by the widow; but if there be a written instrument it must be registered.

No Person can sue to recover possession of properties alienated by his guardian during his minority without setting aside the alienation, and a suit to set aside alienations by the guardian is governed by Art. 44 of Sch. II of the Lim. Act.

*Ranga Reddy* v. *Narayana Reddi* (1905) I. L. R. 28 Mad. 423 and *Madugulla Latchayya* v. *Palla Mukkalinga* (1907) I. L. R. 30 Mad. 393 foll.

*Quaere*, whether sales by reversioners could take effect when the reversion actually falls in on the principle embodied in S. 43 of the Transfer of Property Act, having regard to the prohibition of transfers of mere expectancies by Section 6 (a) of the same Act.

*Lakshmi Naraya* v. *Munugarra Jagannatham* (*Spencer and Krishnan.*) ... ... ... 229

——*Testamentary guardian—Appointment of, by father or manager in respect of co-parcenary property of minor members, if valid.* ...

Under the Hindu Law, it is not competent to the only adult co parcener of a Mitakshara joint family consisting of himself and his minor co parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners.

Authorities on the subject considered.

*Chidambara Pillai* v. *Subbayya Pillai*. (*Ayling, coutts Trotter and Seshagiri Aiyar, JJ.*) F. B. ... ... ... 384

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———Widow—Alienation by—Reversioner's suit to set aside-Necessity —Proof—Onus—Quantum—Lapse of time—Effect ... ... 319

———Widow-Decision against when *res judicata* as against reversioner 319

———Widow. Surrender to daughter's son with consent of daughter —Validity ... ... ... ... 229

**Indian Income Tax Act** (II of 1886), **S. 31** (3)—*Indian Income Tax (Amendment, Act (V of 1916), S. 4 Effect of, on agreement for composition of income tax.*

The effect of the new Sub-sec. 3 of S. 31 of the Income Tax Act is to put an end to any subsisting agreement for composition of the income tax on the first of April 1916 when the enhanced rates of assessment came into force and to any future agreement, when any further change of the rate of tax is made. The operation of Sub sec. 3 is, however limited to sums which have not become payable and the agreement still subsists as to sums which have become payable but have not been actually paid at the date of the change of rate.

*Abdul Sukur Saheb* v. *Secretary of State for India.* (*Bakewell, J.*) 210 a

**Indian Penal Code S. 430**—*Mischief by wrongfully diverting water from irrigation channel—Diverted water, not allowed to run to waste, but used for agricultural purposes—Water stored for being used by other persons. diversion of—Offence.*

The accused entered on the lands of the complainant and cut three bunds which had been erected in a channel that ran through the complainant's land with the result that the water in that channel ran down another channel off the complainant's land and was utilised by the accused for sale to ryots holding lands lower down. The accused was convicted of an offence under S. 430, Indian Penal Code and the conviction was upheld on appeal. It was contended for the accused in revision, that no offence had been committed by him, first because the water diverted by the accused had been used for agricultural purposes and not allowed to run to waste, and secondly because the complainant himself had intended not to use the water for his own fields but merely to sell the use of it to other persons though the latter might use it for agricultural purposes. *Held*, overruling both the contentions, that the conviction was legal.

There is no warrant for assuming that S 430 of the Penal Code was intended only to penalise the waste of water and not the deprivation of a person who has the right to use it.

*Ayannagowd* v. *Emperor* 1. (1882) 1 Weir 507, distinguished.

*Ramakrishna Chetty* v. *Palaniandi Kudumbar* 2. (1876) I. L. R. 1 M. 262. *Chengama Naidu* v. *Emperor* 3. (1911) M. W. N. 349 *Emperor* v. *Shiekh Ariff* 4, (1908) I. L. R. 35 C. 437, Referred to.

*Chidambaram Pillai* v. *Muhammad Khan Sahib.* (*Abdur Rahim and Napier, JJ.*) ... ... ... ... 207

**Injunction**—*Right to the use of water in a Government channel—Right not based on prescription—Mere possessory right—Suit for declaration of right and injunction—Government not impleaded in the suit—Effect of—Incorporeal hereditament possessory right, in respect of.*

In a suit by plaintiffs for recovery of possession of certain ryotwari lands from their lessees, the defendants, plaintiffs also asked for a declaration of their rights and an injunction restraining the defendants from causing obstruction to the flow of water from a Government channel

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Diguva to the suit lands. The Government, however, was not made a party to the suit. It was found that according to the Government register the source of supply to the suit lands was another Government channel but that the defendants who were in possession of the suit lands as lesees, had, under some arrangement with the Government, been irrigating them for the last 20 or 30 years with the water of Diguva channel which was the proper source of irrigation for the defendant's own lands. It was also found that the plaintiffs had not acquired a right of easement or any right to take water from the Diguva channel by prescription. The plaintiffs claimed that they must be deemed to have been in possession of the right to take water for the suit lands from the Diguva channel through their lessees, the defendants, and that they were entitled to a prohibitory injunction consequent upon a declaration of their rights.

*Held*, that, in the circumstances of the case, the plaintiffs were not entitled to the declaration and injunction prayed for. The plaintiffs had established no right as against anybody in the water of the Diguva channel, whatever right they might have as against the Government for the supply of water to the lands in question. Nor could the plaintiffs be said to have been in such possession of the channel or any easement with reference to it, as to entitle them to an injunction. The grant of a declaration being discretionary, the court should not grant a declaratory decree to the plaintiffs in the absence of the Government, the owner of the channel in question.

*Narasayya* v. *Ganapathi Row* (1913) I. L. R. 38 M. 280. *Kondapa Rajam Naidu* v. *Devarkondu Suryanarayana* (1910) I. L. R. 34 M. 173= 20 M. L. J. 803, referred to.

*Mahankali Lakshmiah* v. *Karnam Narayanappa.* (*Abdur Rahim and Napier, JJ.*) ... ... ... 425

**Jurisdiction** — *Small Cause Court — Suit for recovery of unpaid consideration for a mortgage—Whether a suit for specific performance.*

A suit for recovery of part of the consideration that remained unpaid for a usufructuary mortgage is a suit for specific performance; and such a suit is not cognizable by a court of Small Causes.

*Rajagopala Aiyar v. Sheik Davood Rowther* (*Abdur Rahim and Bakewell, JJ.*) ... ... ... ... 342

———Question as to—Defendant's plea if material ... ... 309

**Land Acquisition Act** — Appeals under—Consolidation — Power of appellate Court. ... ... ... ... 279

**Land Improvement Loans Act** (**XIX of 1883**) **Ss. 4 and 7 (1) (c)**—*Loan for improvement, what is—Sale of land if free of prior incumbrances—Madras Revenue Recovery Act (II of 1864), S. 42—Proviso to a section, effect of.*

The provisions of S. 42 of the Madras Revenue Recovery Act (II of 1864) apply to a sale under S. 7 (1) (c) of the Land Improvement Loans Act and a sale of land under the provisions of the latter enactment is free of all prior incumbrances.

*Ramachandra* v. *Pitchai Kanni* (1884) I. L. R. 7 M., 434. *Chinnasami Mudali* v. *Tirumalai Pillai and Secretary of State* (1901) I. L. R. 25 M. 572. *Secretary of State* v. *Pisipati Sankarayya* (1910) I. L. R. 34 M. 498. referred to. ... ... ... ...

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A loan which was applied for and obtained for the purpose of effecting an agricultural improvement does not cease to be such simply because the borrower started the "improvement" before he actually received the loan from the Government or because a second instalment of the loan was disbursed by the Government when the first had not been fully utilised within the time prescribed by the rules framed by the Government.

The words of a proviso cannot be used to extend the operation of the section to which it is attached. But where there is doubt as to the true meaning of the substantive part of a section, it is legitimate to look to the words of a proviso, in order to determine the proper interpretation of the section.

*West Deorby Union* v. *Metropolitan Life Assurance Society* (1871) A. C. 647 relied on.

*Sankaran Nambudripad* v. *Ramasami Aiyar*. (*Ayling and Seshagiri Aiyar*, *JJ.*) ... ... ... ... 494

**Landlord and Tenant**—*Forfeiture—Denial of title, what constituted—Tenancy for life, if liable to forfeiture—Power of Courts to grant relief against forfeiture for denial of title—Transfer of Property Act, S. 111 (g)—Principle of, if applicable to agricultural leases.*

In a suit to eject a tenant for life on the ground that the latter had forfeited his right by denying the title of the landlord, it was found that the only act relied on by the plaintiff as a denial of his title was the insertion of a recital in a sale-deed executed by the defendant of properties other than those comprised in the lease, that he was the absolute owner of the properties forming the subject of the lease.

*Held*, that there was not, in the circumstances of the case, such a direct and unequivocal denial of the tenancy as would in law, work a forfeiture and that the suit was, therefore, not maintainable.

Per *Seshagiri Iyer*, *J.* :—Even in the case of a tenancy for life, a denial of the landlord's title by the tenant entails a forfeiture of the tenancy. Assuming that Courts have power to relieve against forfeiture in such a case that power will not be exercised unless the tenant proves that the denial was occassioned by the fraud or mistake of the landlord, or by accident and that he was himself neither careless nor negligent.

Per *Seshagiri Iyer*, *J.* :—(*Napier*, *J.* dissenting) : The principle embodied in S. 111 (*g*) of the Transfer of Property Act applies to agricultural leases.

*Avaran Marakarakath Kemalutti v. Pulikkalakatu Puthikath Muhamad.* (*Seshagiri Aiyar and Napier, JJ*) ... ... ... 170

——Kuzhikanom lease—Lessee in possession after expiration of term—His right to improvement—Nature of such possession—Ejectment—Notice to quit—Necessity. ... ... ... ... 128

——*Permanency of tenure—Tanjore District—Temple holding land as ryotwari proprietor—Claim of occupancy rights by tenants—Onus of proof—Temple recognised as Ekabhogam Mirasidar—Lease by Manager—Tharam—Faisal Muchilika—Execution of, by tenants describing themselves as ulavadaikani mirasidar and purakudi—Assertion of permanent tenancy—Effect of.*

The village of Sellur in the Tanjore District belonged to a temple which was registered as the ryotwari proprietor thereof paying revenue to Government. The paimash account of 1816 showed that the temple was

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the sole proprietor of the soil of all the lands in the village at that time and was paying revenue in the shape of paddy to Government. In the paimash register of 1829 the temple was described as the sole *Ekabhogam Mirasidar* of the village and some of the tenants of the nanjah lands were described as *ulavadaikani mirasi* tenants. During the years 1820 to 1828 the Collector of Tanjore who was then in management of the temple and its properties let the lands of the village for cultivation to the highest bidders for short terms of 1 to 3 years. The actual cultivation was done generally by *purakudis* who held under no definite term and who were entitled only to *purakudiwaram* to be paid by the lessee out of the gross produce. In the year 1831 seven persons, the predecessors-in-title of the defendants, applied for and obtained a lease of the temple lands from the Collector on executing in his favour a "*Tharam Faisal Muchilika*". The executants of the *Muchilika* were variously described, some of them as *purakudis* and others as *Ulavadaikani Mirasidars* but they all agreed to pay a fixed cash revenue to the Government though the same was due directly from the lessor (the temple) and also to pay the price of the paddy grain besides the *punjah* cash rent, due to the temple as *swamibhogam* so long as the lands were in their possession. There were also provisions for payment of additional cash revenue to Government and thunduwaram or additional swamibhogam to the temple, if garden crops etc. were raised or if waste lands were brought under cultivation by the tenants. It was also in evidence that the defendants and their predecessors-in-title had all along been selling and mortgaging the lands to the knowledge of the sucessive trustees of the temple. In 1910 the trustee of the temple brought a suit to eject the defendants after serving them with proper notice to quit.

*Held*, that, on the facts of the case, and having regard to the muchilika executed by their predecessors-in-title in the year 1831, the defendants had no occupancy rights in their possession but were merely holding them under a yearly tenancy and that they were liable to be ejected.

*Chockalinga Pillai* v. *Vaithilinga Pandara Sannadhi* (1871) 6 M. H. C. R. 164. *Thyagaraja* v. *Gyana Sammandha*, (1887) I. L. R. 11 M. 77. *Chidambaram Pillai* v. *Thiruvengadathiengar* (1897) 7 M. L. J. 1. *Mayandi Chettiar* v. *Chockalinga Pillai* (1904) I. L. R. 27 M=14 M. L. J. 200. *Naina Pillai Marakayar* v. *Ramachandra Chettiar*, (1917) 33 M. L. J. 84 Relied on.

Permanent holding under ryotwari proprietors, being unusual and exceptional, the onus of proving that a tenant holding under a ryotwari propietor has a permanent right of occupancy in the land, is on the tenant.

*Chidambara Pillai* v. *Thiruvengadathiengar* (1897) 7 M. L. J. 1 *Cheekati Zemindar* v. *Rannasooru Dhora* (1899) I. L. R. 23 M. 318. Referred to.

Where it is proved that a tenant came into possession of land under a lease for a term, the subsequent assertion of a permanent tenancy by the tenant cannot confer such right upon him, especially, when the landlord in a temple whose trustee cannot grant a permanant lease of the temple lands without committing a breach of trust.

*Muna Muhmmad Rowther* v. *Muthu Alagappa Chettiar*. (*The Chief Justice and Sadasiva Aiyar, J.*) ... ... 234

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**Legal Practitioners Act**—Rules under—Rule 41—Special importance of case—what amounts to ... ... ... 488

**Limitation**—*Admission of appeal after period of limitation without notice to respondent—Open to reconsideration at instance of respondent—Practice of Indian Courts—Stage at which question of limitation should be finally decided—Directions of the Privy Council—Indian Limitation Act,* 1908 (*Act. IX of* 1908) *Ss.* 4, 5.

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made *ex parte* it is open to reconsideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal although this may have hitherto been the usage in India. The Courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal.

*Krishnasami Panikondar* v. *Ramasami Chetty.* (*Sir Lawrence Jenkins*) *P. C.* ... ... ... 63

**Limitation Act of 1859, S. 1 cl. 12**—*Alienation by a Hindu woman having only a contingent interest—The woman succeeding to the property—Lapse of years after succession—Suit to recover property barred—Hindu widow sued as representative of the Estate—Decision binding on the reversioner as res judicata—Alienation by a Hindu widow—Reversioners not barred after 12 years from the alienation under the Limitation Act of 1859—Lapse of time after the alienation—Effect of on the onus of proof on the alienee to show justifiable necessity.*

Where after the death of the last male-holder, his widow V. and his mother G. sold some of the properties inherited and V. died in 1854 and G. inherited the properties and she sold the properties in 1857 to a third person, who sued the vendee under V and G impleading G as a defendant in the suit and it was dismissed on the ground that G herself was barred by limitation and consequently the plaintiff was barred.

*Held,* in a suit by the reversioner to recover possession of the properties after the death of G in 1908, that the suit was barred by limitation under S. 1 cl. 12 of the Limitation Act of 1859 as the conveyance by V. & G. was not capable of conveying G's interests as she had only a contingent interest and she could have sued to recover possession after 1854 and as she did not sue for possession she was barred and consequently the reversioners also were barred.

The suit is also barred by *res judicata* by reason of the decision in the suit of 1857 to which G was a party as representing the Estate, the finding in which suit would operate as *res judicata* against any person subsequent claiming in the interest of the Estate such as the present plaintiff reversioner.

*Per Seshagiri Aiyar, J.*—The rule that under the Limitation Act of 1859 if the widow is barred by limitation the reversioners would be equally barred does not apply to alienations by the widow because where a widow conveys property no question of adverse possession as against her arises unless the conveyance is inoperative to pass property.

Lapse of time after the alienation by the widow may enable the court to consider the evidence let in by the alienee favourably and to pay more

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attention to the recitals in the conveyance than would otherwise have been done but it can have no weight when there is no substantive evidence on the question of necessity.

*Kunjam Venkataramanayya* v. *Dejappa Konde* (*Spencer and Seshagiri Aiyar, JJ.*) ... ... ... 319

——— Prescription—Acquisition of title by ... ... 344

——— S. 5—Appeal Presentation after expiration of time specified—Order excusing delay without notice to respondent—Effect—Propriety—Practice. ... ... ... ... 68

——— S. 13—*Effect—Suit against partners of firm—One of the defendants absent from British India for portion of the period of Limitation—Effect—Plaintiff's right to deduction of period (1) as against all defendants (2) at least as against absentee defendant—English Law compared—Partnership—Death of one of the partners—Effect—Legal representative of deceased partner—Position and rights of—Release by one partner—Binding nature on other or others—Conditions Binding nature on legal representative of deceased partner.*

A, B and C were partners with D in a firm known as the Epoh Firm. A, B and C were also partners with E in another firm known as the Singapore Firm. D died in 1903, and during the course of the winding up of the Epoh Firm, that is, in December 1903, A, B and C lent to the Singapore Firm a certain sum of money. In a suit instituted in November 1909 by F. the son of D, against A, B, C and E for the recovery of plaintiff's share of the money so lent to the Singapore Firm, it appeared that E was not in British India between the end of 1903 and December 1908, though the other defendants were in British India all the time and that by a *bona fide* deed of composition entered into by the Singapore Firm with its outside creditors, E was on payment of a certain sum of money to pay off those creditors, released from liability to his partners for any moneys advanced by them.

*Held,* (1) that the absence of E from British India would under S. 13 of the Limitation Act, entitle plaintiff to claim a deduction of time as against E alone and not as against A. B and C also, and the fact that plaintiff could have sued A, B and C, who were the co-obligors of E and were within British India during the said period, was not a ground for holding that the claim as against E was barred by Limitation; and

(2) That the release of E was, in the circumstances of the case, binding on plaintiff, his remedy, if he had been damnified by the conduct of A, B and C, being to sue them for damages.

Effect of S. 13 of the Limitation Act in cases in which one of the defendants alone is absent from British India considered and compared with the English Law on the subject.

The legal representative of a deceased partner of a firm is not by implication a partner.

The right of some of the partners of a firm to avoid a fraudulent release of a debt by the other partner or partners and to recover their share of the released debt is personal to them and their legal representatives are not entitled to such a right.

After dissolution by the death of one of the partners, the surviving partners still have the right of releasing a debt to the firm.

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*Palaniappa Chettiar* v. *Veerappa Chettiar.* (*Ayling and Seshagiri Aiyar, JJ.*) ... ... ... ... 41

——— **S. 9**—*Letter stating that no assignment deed was shown and that 3rd-parties claimed the debt—If acknowledgment may be implied—Construction of documents purporting to be acknowledgments.*

Where, in answer to a letter of the plaintiff, who was an assignee of a debt, asking the defendant debtor to credit the money in a particular way, the defendant wrote a letter stating that no deed of assignment was shown to him, that there were counter-claimants claiming the amount for themselves and that he could not therefore credit the amount as desired;

*Held*, that the statement in the letter amounted to an acknowledgment of liability.

An acknowledgment may be implied as well as express and may be spelt out if it be shown that the liability is subsisting; *Sukhamoni Chowdhrani* v. *Khan Chunder Roy* (1898) I. L. R. 25 C. 844. followed.

Documents purporting to be acknowledgments ought to be liberally construed.

(*Subba Rao* v. *Parasurama Pattar*) (*Seshagiri Aiyar, J.*)... ... 551

——— **S. 19 and 21 (2)**—*Acknowledgment by partner when binding on partnership—Evidence of express authority, if necessary.*

Direct evidence of a specific authority by a co-contractor or partner to his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, is unnecessary and such an authority can be inferred from circumstances.

(*Pandiri Veeranna* v. *Grandhi Veerabhadraswami*) (*Ayling, Coutts Trotter and Seshagiri Aiyar, JJ.*) (*F. B*) ... ... 373

——— **Art. 31**—*Continuous carriage of goods—Claim for—Compensation for short delivery.—Carrier—Landing agents—Bill of lading—Claim for short delivery to be made at a certain place within a month—Reasonable condition* ... ... ... ...

Plaintiff was the consignee of certain timber through the first defendant, a firm of carriers by sea. The material portion of the bill of lading was as follows: The Company (first defendant) is to have the option of delivering the goods or any part thereof, into receiving ship, or landing them at the risk and expense of the shipper or consignee as per charges specified......... and is also to be at liberty until delivery to store the goods or part thereof in receiving ships, godown, etc., the usual charges wherefor being payable by the consignee or shipper......In all cases and circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk of the shipper or consignee." The second defendant, was a firm which had a monopoly of landing all the goods from the ships of the first defendant, but on receipt of separate charges from the consignee. In a suit by the plaintiff for compensation for that delivery, against both the defendants;

*Held*, (1) that there was privity of Contract between the consignee and the landing agents, the 2nd defendant, (2) that the case being one of continuous carriage of goods, the second defendant was a carrier though not a common carrier within the meaning of the Carriers Act of 1865, and (3) that the suit against both the defendants was governed by Art. 31 of the Limitation Act.

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*Venkata Subba Rao* v. *Asiatic Steam Navigation Co.* (1915) I. L. R. 39 M. 1=29 M. L. J. 342, followed.

*Per Chief Justice*—A stipulation by a Steamship Company carrying on business as carriers, that they would not be answerable for short delivery unless they were appraised of the claim at a specified place and within a month of the delivery is not unreasonable. But a claim made on the landing agents of the Steamship Company who were employed only to land goods from the steamers and to take them to the godown, is not a sufficient compliance with the condition. *B. I.S. N. Co.* v. *Hajee Mahomed Esack and Co.* (1881) I. L. R. 3 M. 107, followed.

*Mylappa Chettiar* v. *The British India Steam Navigation Company, Ltd*, (*Chief Justice and Kumarasami Sastri, J.*) ... 558

———**Art. 44**—Applicability—Guardian—Alienation by—Suit by minor after attaining majority to recover property alienated—Limitation ... 229

———**Arts. 57, 61, 62, 115 and 120**—*Suit for recovery of moneys advanced by a partnership consisting of some of the members of a joint Hindu family to the family—Partition suit—Barred debt, if can be claimed.*

Plaintiff and defendants 1 to 3 who were some of the junior members of a joint Hindu family, carried on a partnership trade for their separate benefit, even during the life-time of their common ancestor P. who died in 1906. For his funeral expenses, the partnership spent its own moneys. The partnership was dissolved in 1911 and the amount due to the partnership on the above account by the joint family estate fell to the share of the plaintiff among the partners. In a suit for partition in 1913, plaintiff claimed to recover from the first defendant and defendants 2 and 3 (who formed a single branch), ⅔ of this amount, the remaining ⅓ being the amount which he was liable to pay as a member of the joint family.

*Held*, that the cause of action for the partnership to recover the moneys arose on the date of the loan, that the partnership could have sued the joint family for recovery of this debt notwithstanding that some members of the joint family solely constituted the partnership, and that the plaintiff's claim could not be treated as an item of account in the partition suit as it was barred by limitation.

*Vellayappa Moothan* v. *Krishna Moothan.* (*Sadasiva Aiyar and Phillips, JJ.*) ... ... ... ... 32

———**Art. 62 ; S. 18**—Applicability ... ... ... 193

———**Arts. 126, 144 and 148**—*Applicability— Hindu Law (Mitakshara)—Joint Family—Usufructuary mortgage of family property by father and son—Subsequent sale of entire property by father and possession obtained by vendee on redemption—Suit by son or his alienee to recover his (son's) share of property on payment of proportionate mortgage amount—Limitation—Starting point.*

Family property owned in equal moieties by a Hindu governed by the Mitakshara Law and A, his undivided son, was mortgaged with possession by them both to B in 1892. The entire property was in 1897 sold to C by the father, as though it were his self-acquisition. In April 1898 C paid up the mortgage amount, obtained possession of the property and remained in possession thereof, all along claiming an absolute right to the entire property. On his father's death A, however, sold his half share in the property to D. In a suit instituted on 26th August 1912 by

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D against A, B and C for possession of A's half-share in the property on payment of the appropriate proportion of the mortgage amount, *held* that the suit was governed by Art. 123 of the Limitation Act and, having been filed more than 12 years after the possession of C began, was barred.

Per *Sadasiva Aiyar, J.*—Even if Art. 126 did not apply to the case and Art. 144 did, the suit was barred thereunder.

Observations on the scope and applicability of Art. 126.

*Munia Goundan v. Ramasami Chetti. (Oldfield and Sadasiva Aiyar, JJ.)* ... ... ... ... ... 128

———**Art. 134**—*Transferee from mortgagee by conditional sale—Whether takes an absolute interest—Intention—Burden of proof of—Civil Procedure Code, S. 11, Explanation 2—Finding on issue necessary for decision, adverse to party in whose favour the decree is passed, if* res judicata—Res judicata *if dependent upon right of appeal.*

Where the plaintiff brought a suit to redeem a mortgage by conditional sale executed by his predecessor in title to one S. In 1872 and wher it was proved that S. sold the property comprised thereunder to V in 1379 with the intention of transferring an absolute interest, and the intention of the parties was that there should be an absolute transfer of title.

*Held* that the suit was barred by Art. 134 of the Limitation Act as more than 12 years had elapsed since the date of the transfer by the original mortgagee.

Per *Seshagiri Aiyar and Bakewell, JJ.*—Whether a transferee from a mortgagee took an absolute interest or only a mortgage interest is a question of intention. The fact that his vendor had only a mortgage right would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? The burden of proving such intention is upon the purchaser.

*Radhanath Doss* v. *Gisborne* (1871) 14 M. I. A. 1. and *Pandu* v. *Vithu* (1894) I. L R. 19 Bom. 140, followed.

*Kannuswami Thangirayan* v. *Muthuswami Pillai* (1917) M. W. N. 5. *Subbaya Pandaram* v. *Mohammad Mustapha Marakayar* (1916) 32 M. L. J. 85. *Singaram Chettiar v. Kalyanasundaram Pillai* (1914) 1 L. W. 687. *Baluswami Iyer* v. *Venkataswamy Naicken* (1916) 32 M.L.J. 24 referred to.

The omission from the Acts of 1877 and 1908 of the words "in good faith" which were in S. 5 of the Act of 1859 which was applied in *Radhanath Doss* v. *Gisborne*, does not affect the present question.

Per *Bakewell, J.*—If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

Where a suit brought by a member of an undivided Hindu family to set aside an alienation by the manager was dismissed on the ground that the alienation was a mortgage and the suit ought to have been one in redemption. *Held* that the decision as to whether the alienation was by way of mortgage or sale operated as *res judicata* against the alienee in the subsequent suit brought for redemption.

Per *Seshagiri Aiyar, J.*—If there has been an adverse finding on an issue necessary for the decision of the case but the final decree is in favour

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of the party against whom the issue is found, such finding not being incorporated in the decree, no appeal seems to lie from the decision, as Ss. 96 and 100, Civil Procedure Code, give a right of appeal only against decrees.

*Yusuf Sahib* v. *Durgi* (1907) I. L. R. 30 M. 447 *Ranganathan Chetty* v. *Lakshmi Ammal* (1913) 25 M. L. J. 379. *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (1905) 9 C. W. N. 584 *Secretary of State* v. *Swaminatha Kounden* (1911) I. L. R. 37 M. 25=21 M. L. J. 947 *Brij BehiriLal* v. *Shivanath* (1916) 20 C. W. N. 1354 referred to.

A finding if necessary for the decision of the suit is *res judicata* even though there is no right of appeal. There is nothing in the language of S. 11, Civil Procedure Code, to suggest such a test. The language of Explanation 2 implies that the competence of a court for the purpose of *res judicata* is not affected by the fact, that its decision is not appealable. The proper procedure in such cases seems to be for the party to ask the Court to embody the finding in the decree, so that he may have a right of appeal against such decision.

*Jamaitunissa* v. *Latifunnissa* (1885) I. L. R. 7 A. 606 referred to.

*Muthaya Chetti* v. *Kanthappa Chetti*. (*Seshagiri Aiyar and Bakewell, JJ.*) ... ... ... ... 431

**Lis pendens**—*Doctrine applicable only as between opponents in a suit —Does not apply to alienations by parties ranged on the same side and between whom there is no issue—Transfer of Property Act, S.* 52—"*Any other party*" *meaning of—Should receive a restrictive construction.*

The principle of *lis pendens* is only applicable as between opponents with regard to alienations made by any one of them during suit.

*Bellamy* v. *Sabine* (1857) 1 De G. and S. 566. *Faiz Husainkhan* v. *Prag Narain* (1907) I. L. R. 29 A. 339 at 345 (P. C.), Referred to.

The language of S. 52 of the Transfer of Property Act, which enacts that property cannot be transferred by any party to the suit or proceeding so as to affect the rights of *any other party* thereto does not compel the courts to apply the doctrine as between parties to the suit who are arrayed on the same side and between whom there is no issue for adjudication.

The expression "or any other party" in S. 52 should receive a restricted construction and means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

*Manjeswara Krishnayya v. Vasudeva Mallayya,* (*The Chief Justice, Bakewell, and Kumaraswami Sastri, JJ.*) ... ... ... 268

**Madras Act II of 1864.** Ss. 59 and 63—*Sale of minor's property for arrears of Revenue—Patta standing in the name of mother—Suit to set aside sale—Limitation—Whether S. 59 applies—Regulation X of* 1831, *if applicable—Whether Ryotwari Estates come within S.* 2 *of Regulation X of* 1831.

Regulation X of 1831 applies to all estates of minors, permanently settled or ryotwari, of which the Court of Wards can assume management, irrespective of the magnitude of the estate.

S. 59 of Act II of 1864 does not apply to sales for arrears of Revenue, which are illegal, as contravening S. 2 of Regulation X of 1831, which prohibits the sale of estates of minors inherited by them for arrears of Revenue accruing during their minority.

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The fact that the patta for a minor's properties was wrongly issued in the name of an adult does not preclude the minor from invoking the aid of Regulation X of 1831.

*Swaminatha Aiyar* v. *Govindaswami Padayachi* (*Sir John Wallis, Chief Justice, Sadasiva Aiyar*, and *Spencer, JJ.*). ... ... 536

**Madras Court of Wards Act (I of 1902) S. 41—Ss 45 and 47**—*Construction Applicability—Unnotified claims—Rights of securred creditors—Applicability of provisions of section to executing Courts, including Decree-Collector—Civil Procedure Code, of* 1882 *Ss.* 321-325 (*c*) *Effect.*

The cessation of interest provided for by S. 41 of the Court of Wards Act in the case of a claim which has not been duly notified is final and the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

In the case of secured creditors who have not notified, S. 41 only prohibits payments to them by the Court of Wards out of the unincumbered funds at its disposal and does not prohibit the realisation of the security and the satisfaction out of the proceeds of the secured creditor's claim.

The prohibition of payment in S. 41 of the Act must be confined to the Court of Wards and does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards And, when the Local Goverment exercises its power under S. 45 of the Act of transferring decrees against the Ward to the Collector for execution, the provisions of S. 41 as to order of payment do not affect the Decree-Collector, as he is called, in the discharge of his duties under Ss. 321-325 (c) of the Civil Procedure Code of 1882 which are made applicable by S. 47 of the Act. The provisions of S. 41 as to the cessation of interest, however, continue to apply even in such cases.

*Depuru Kalappa Reddi* v. *Umadi Rajah*, (1911) 1 M. W. N. 75 Cons. *Srinivasa Ranga Row* v. *Raja Kumara Venkata Perumal.* (*The Chief Justice, Bakewell and Kumaraswami Sastri JJ.*) ... 454

**Madras District Municipalities Act (IV of 1884) S. 53**—*Profession tax, levy of—Carrying on business within the municipality, what constitutes—Question of fact.*

The plaintiffs, the Clan Line Steamers Ltd., were an Incorporated Company having their registered office and head place of business in Glasgow. They owned a line of steamers which plied between English ports and the East calling among other places at Madras, and at Cocanada in the Godavari District. The agents for the ' Clan Line ' in Madras were Messrs. Gordon Woodroffe and Co. Under an arrangement with Gordon Woodroffe and Co., Messrs. Ripley and Co. of Cocanada acted for the Clan Line Steamers Ltd., and received payment by commission. The defendants were the Municipal Council of Cocanada, a District Municipality constituted under the Madras District Municipalities Act of 1884. Under S. 53 of the Act the defendants levied a profession tax on the plaintiffs on the ground that the latter carried on business as a company and as shipowners within the Municipality. The plaintiffs paid the tax under protest and sued to recover the same. The facts found at the trial were these. Cocanada was mostly an exporting sea port and hardly any cargo was discharged there. If by chance any cargo did go to Cocanada, it

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was discharged from the clan ships into lighters provided by the holders of the bills of lading. Ripley and Co., did not handle the cargo though they might occasionally collect freight and transmit it to Gordon Woodroffe and Co. In the matter of booking space in the outgoing ships for cargo to be embarked at Cocanada, Messrs. Ripley and Co. had no controlling voice but could act only with the previous authorisation of Gordon Woodroffe and Co. Most of the arrangements for shipment from Cocanada were made by the Cocanada merchants with Gordon Woodroffe and Co., either directly or through shipping brokers at Madras. Sometimes the Cocanada shippers applied to Ripley and Co., to get them space on the Clan ships and their applications were forwarded to Gordon Woodroffe and Co., who generally sent what was called an engagement form through Ripley and Co., to the intending shippers. That form contained the acceptance and completed the contract. If time was short Gordon Woodroffe and Co. telegraphed to Ripley and Co., instruction as to what amount of room was available for the proposed shipper. On receiving the authorisation, Ripley and Co., issued a shipping order to the shipper who thereupon took the goods to the ship and obtained the mate's receipt and in due course, bill of lading signed by Ripley and Co., for the master. If the goods put on board were in a slightly damaged condition the shippers obtained clean bills of lading on signing indemnity forms addressed to Ripley and Co. Ripley and Co. collected freight and disbursed the Clan ships, a large portion of the disbursements consisting in payments for stores supplied to the ship under contracts made by Gordon Woodroffe and Co. with the suppliers at Cocanada. *Held*, that the business of making shipping contracts for the Clan Line Steamers, Ltd., with the Cocanada Merchants was substantially carried on at Madras, that the activities of the plaintiffs at Cocanada did not amount to a carrying on of business in the said place within the meaning of the authorities and that the levy of profession tax by the defendants being illegal, the plaintiffs were entitled to a decree for the amount of the tax they had paid to the defendants

Cases on the subject reviewed.

*Clan Line Steamers Limited v. Municipal Council of Cocanada.* (*Coutts Trotter, J.*) ... ... ... ... ... 145

**Madras Estates Land Act. S. 3 Sub—S. 2** (*d*), **S. 8, (1) and (2),** *and exception—Acquisition by one of the inamdars of the entire Kudivaram interest by gift—Lease of some of the lands—Suit for rent—Civil Court, jurisdiction of—Whether the exception to S. 8 applies to Sub-Ss. 1 and 2 of S. 8—"The inamdar" meaning of.*

Where the plaintiff, one of the fractional share-holders of the Melwaram right in an inam village acquired by gift the Kudiwaram right in the whole village and he leased to the defendant certain lands in the village on lease, a suit for rent by the plaintiff against the defendant would lie in the Revenue Court and not in the Civil Court.

The expression "The inamdar" in the exception to S. 8 must be read in its strict sense as equivalent only to the owner of the entire interest in the inam and the exception should be treated as applicable only to Sub-S. 1 of S. 8.

*Rajachari v. Manager, Tirumugoor Devastanam.* (*Oldfield and Sadasiva Aiyyar, JJ.*) ... ... ... ... 419

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——**Ss. 3 (11), 40 (3) (a) and Sch. A. Cl. (4)**—*Commutation of rent—"Preceding ten years," mode of computation of—' year," meaning of Swamibogham, if 'rent'—Consolidated rent agreed to, by landlord and tenant—Objection by tenant that illegal cesses were included, if maintainable—Refusal to commute rent, by Revenue Court—Appeal—Forum—Interference by High Court in second appeal.*

The term "preceding ten years" in S. 40, Cl. 3 (*a*) of the Madras Estates Land Act means the ten years preceding the year in which the Court actually determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The "year" which is contemplated by the section is neither the *fasli* nor the calendar year but the year for which the landlord is entitled either by custom or by contract, to claim rent.

*Swamibhogam* comes within the definition of "rent" in S. 3 (11) of the Estates Land Act and is not a cess. Where a fixed grain *pattam* (rent) has been agreed to as between landlord and tenant, it is not open to the tenant to ask for a deduction on the ground that certain illegal cesses were included therein. The transaction under which the pattam was so fixed will be treated as an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year, by which the landlord gave up his claim whether enforceable or not, to recover certain cesses and by which both parties finally agreed that the rent shall be a consolidated quantity of grain thereafter.

Where a Revenue Court refuses commutation, an appeal lies to the District Collector under Sch. A, cl. 4 of the Estates Land Act and not to the District Court and therefore no second appeal lies to the High Court from such refusal.

*Sivanupandia* v. *Meenakshisundara Vinayaga (Sadasiva Aiyar and Spencer, JJ.)* ... ... ... ... 391

**Madras Proprietary Estates Village Service Act, S. 17**—Village service inam—Enfranchisement—Mortgage after grant of title deed but before notification—Validity—Subsequent notification—Effect—Transfer of Property Act, S. 43, applicability. ... ... ... 17

**Mahomedan Law**—*Inheritance—Right of—Transfer or Renunciation before vesting—Validity.* ... ... ...

A transfer or renunciation of the right of inheritance before that right vests is prohibited under Muhammadan Law.

*Kunhi Mamood* v. *Kunhi Moidin* (1896) I. L. R. 19 M. 176, not followed.

*Mussi-Hurmut Old Nissa Begam* v. *Allakhia Khan* (1871) 17 W. R. (Civil) 108, explained and distinguished.

*Asa Beevi* v. *Karuppan Chetty. (The Chief Justice, Bakewell and Kumaraswami Sastri, JJ.)* ... ... ... 460

**Malabar Law**—*Decree for ejectment of tenant on payment of compensation—Execution of decree, barred—Fresh suit for ejectment, if maintainable—Cause of action—Merger of, in decree*

A landlord who obtains a decree for ejectment against a Malabar tenant on payment of compensation but allows execution of the decree to become barred by limitation, cannot institute a fresh suit for ejectment.

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*Kutti Ali* v. *Chindan* (1900) I. L. R. 23. M. 629, dissented from. *Vedapurathi* v. *Vallabha Valia Raja* (1902) I. L. R. 25 M. 300, referred to.

Per *Chief Justice*:—Ordinarily when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree; *transit in rem judicatum*, and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone.

*Nyunam Veetil Mayan Kutti* v. *Valappilakath Kunhammad.* (*The Chief Justice and Sadasiva Aiyar, J.*) ... ... ... 167

———*Devaswam—Uralan and Samudayi—Nature of office—Suit for redemption of Kanom by Samudayi without reference to Uralan—Maintainability of—Limitation Act (XIV of 1859)—Limitation Act (XXXII of 1861)—Title by prescription if could be acquired under.* ... ... ... ...

A hereditary samudayi of a Malabar devaswom who has been in possession and active management of its properties for more than the statutory period without reference to the Uralan, is entitled to bring a suit in his own name for redemption of a kanom of the devaswom properties.

*P. K. Unni Nambiar* v. *C. M Nilakandan Bhattathirpad* (1892) I. L. R. 4 M. 141. *Kunyunneri Nambiar* v. *Nilakandan* (1880) I. L. R. 2 M. 167. *Rama Variar* v. *Krishna Nambudri* (1880) I. L. R. 3 M 270, *distinguished.* ... ... ...

Origin and history of the offices of Uralan and Samudayi in a Malabar Devaswom, considered.

Even before the enactment of S. 29 of the Limitation Act of 1871, a person in possession of property for the statutory period could acquire a prescriptive title to the same.

*Gunga Gobind Mundal* v. *The Collector of* 24 *Pergunnahs*: (1867) 11 M. I. A. 345. *Brindabun Chundar Ray* v. *Tara Chand Banerjee* (1873) 20 W. R. 114. *Jagamba Goswamini* v. *Ram Chandra Goswami* (1903) I. L. R. 31 C 314. *Radhabai and Ramachandra Konher* v. *Anantrao Bhagvant Deshpande* (1885) I. L. R. 9 B. 198, followed. *Kesava Pillai* v. *Peddu Reddi* (1875) M. H. C. R. 95. not followed.

*Raman Somyajipad* v. *Kunhu Kutti Kovilammai* (*Seshagiri Aiyar and Napier, JJ.*) ... ... ... ... 844

———*Family Karar—Removal of then Karnavan and appointment as Karnavan of then senior anandravan—Effect—Status and rights of new Karnavan—Suit for his removal on ground of misconduct—Maintainability—Removed Karnavan left with some of rights of Karnavan—Effect.*

A suit lies for the removal of a Karnavan recognised as such by a family Karar.

Where by a Karar to which all the members of the tarwad were parties, the Karnavan for the time being was removed from the general management and the senior anandravan for the time being was constituted the Karnavan, though the removed Karnavan was allowed to manage a family temple and its income, *held*, in a suit for the removal of the newly constituted Karnavan, that the Karar had the effect of putting an end to the tenure of office of the removed Karnavan and the appointment of the newly constituted Karnavan, that the supercession of the removed

**Malabar Law**—*Contd.* PAGE

Karnavan's rights by the Karar could not be affected by any subsequent unilateral act or possession of intention on his part, and that the newly constituted Karnavan became a de jure Karnavan and could be removed by suit for gross misconduct. *Cheria Pangi Achan* v. *Unnalachan* (1917) 32 M. L. J. 323. distinguished.

*Chindan Nambiar v. Kunhi Raman Nambiar.* (*The Chief Justice, Sadasiva Aiyar and Spencer, JJ.*) (*F. B.*) ... ... ... 400

——Kanom—Grant of Melcharth to third party—Provision for payment of barred arrears of rent to Jenmi after redemption—Assignment of melcharth to Kanomdar—Validity-Jenmi's suit to enforce provisions of as against Kanomdar requiring assignee to pay arrears to Jenmi—Maintainability ... ... ... ... ... 193

——*Right of pre-emption of otti mortgagee——if arises in involuntary sales—C. P. Code, S. 65 and O. 21, R. 92—whether consistent with ottidar's right of pre-emption.*

The right of pre-emption of an otti mortgagee does not arise in the case of involuntary sales, unless the statute under which the sale takes place provides for the exercise of such right. The statutory provisions of the Civil Procedure Code as to sales in execution of decrees are inconsistent with the claim, that the ottidar's right of pre-emption can be enforced against a purchaser in court auction.

*Baij-Nath v. Sital Singh* (1890) I. L. R. 13 All. 224 followed.

*Vasudevan* v. *Ittirarichan Nair.* (*The Chief Justice, Sadasiva Aiyar and Spencer, JJ.*) ... ... ... ... 412

**Malicious prosecution**—*Damages, suit for—What the plaintiff has to prove—Innocence, proof of, if relevant.*

The pivot upon which all actions for damages for malicious prosecution turn, is the state of the mind of the prosecutor at the time he institutes or authorises the prosecution.

*Corea* v. *Peiris* (1909) L. R. A. C. 549.

In an action for damages for malicious prosecution the plaintiff must prove: (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause and (4) that the defendant was actuated by malice. The question of the plaintiff's innocence apart from the acquittal, is only an element of consideration in deciding whether the prosecution ended favourably for the plaintiff, whether there was an absence of reasonable cause for the prosecution and the amount of damages to which the plaintiff is entitled.

*Hicks* v. *Faulkner* (1878) L. R. 8 Q. B. D. 167 *Abrath* v. *North-Eastern Railway Co.* (1883) 11 Q. B. D. 440=L. R. 11 A. C. 25 *Pestonji Muncherji Mody* v. *The Queen Insurance Co.* (1900) I. L. R. 25 B. 332 *Cox* v. *English Scottish and Australian Bank.* L. R. (1905) A. C. 168 *Harischunder Neogy* v. *Nishi Kanta Banerjee* (1901) I. L. R. 28 C. 591 *Nalliappa Gounden* v. *Kailappa Gounden* (1900) I. L. R. 24 M. 59 Ref. to.

*Gopalakrishna Kudva* v. *Narayana Kamthy.* (*The Chief Justice and Spencer, J.*) ... ... ... ... 517

**Minor**—Liability under bond by guardian—Bond for proper purposes—Effect. ... ... ... ... ... 177

**Minor**—*Contd.* PAGE

———Reference to arbitration by guardian—Subsequent revocation of submission—Award passed without anybody to protect minor's interest—Validity. ... ... ... ... 71

**Mirasidar**—Right to Thunduwaram—Custom in Chingleput District ... 104

**Mortgage**—*Mortgage deed—Attestation—Direct evidence of execution required—Transfer of Property Act, (Act IV of* 1882) *S.* 59.

The requirement as to attestation contained in S. 59 of the Transfer of Property Act, 1882, (Act IV of 1882) is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the act.

When, therefore, the only evidence was that the attesting witnesses were on one side of a purdah and the executant of the deed, a purdahnashin lady, on the other: that her son took the deed behind the purdah returned with it bearing a signature purporting to be hers, and said it had been signed by her, and that the witnesses thereupon attested:

*Held*, that the terms of the Statute had not been complied with and that the mortgage was void.

*Shamu Pattar* v. *Abdul Kadir Ravuthan* (1912) L. R. 39 I. A 218= 35 Mad. 607. followed.

*Padarath* v. *Ram Nain Upadhia* (1915) L. R. 42 I. A. 163=37 All. 474 distinguished.

It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below; and their Lordships declined to assent to respondents, prayer for such a remand in the present case

*Rai Ganga Pershad Singh* v. *Ishri Pershad Singh. (Viscount Haldane*). P. C. ... ... ... ... 545

———Specific performance—Suit for—Suit for recovery of portion of consideration for a mortgage—Maintainability ... ... 342

———*Suit for sale—decree for sale—sale under decree not in compliance with Transfer of Property Act—whether such sale bars mortgagor's right to redeem—Transfer of Property Act,* 1882 *(Act IV of* 1882) *ss.* 60, 88, 82—*Questions arising between auction purchaser at sale under mortgage decree and mortgagor to be decided in execution and not by regular suit—Code of Civil Procedure, (Act* 14 *of* 1882) *S.* 244.

In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by Ss. 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold, and purchased (with the permission of the Court) by the decree-holder. The sale was confirmed. The mortgagor thereafter sued for redemption.

*Held*, that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent Court, and such decree had not been appealed, it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with, those defendants were debarred from a right to redeem.

*Held*, also that the present suit was barred by S. 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and should have been raised before the sale was confirmed and if so raised would have been decided by the Court executing the decree.

**Mortgage**—*Contd.* PAGE

*Prasunna Coomar Sanyal* v. *Kasi Das Sanyal* (1892) L. R. 19 I. A. 166 followed.

*Ganapathy Mudaliar* v. *Krishnamachariar.* ... ... 468

———*Transfer of Property Act, S.* 84—*Usufructuary mortgagor—Mortgagor asking the mortgagee for an account of what is due under the mortgage with an expression of willingness to pay—Mortgagee setting up absolute title in himself—Whether, interest on the mortgage ceases to run from that date—Dispensing with tender—Proposal to make a tender—Money should be ready for payment—Rule 41 of the rules framed under Legal Practitioners Act—Special importance by reason of the large amount involved—Two vakils' fees.*

When a mortgagor wrote to the usufructuary mortgagee asking the mortgagee to give him an account of what is due on the mortgage and expressed his willingness to pay what is due to the mortgagee, but the mortgagee stated that under the terms of the deed of mortgage he had acquired an absolute right to the property and therefore he was not bound to render any account and refused to do so and at the same time he mentioned the balance of amount due and it is found that the mortgagor had not then the money with him to pay the amount due, the intrest on the mortgage would not cease to run from the date of the mortgagee's reply.

Their Lordships allowed fees for two vakils under the new rule 41 framed under the Legal Practitioners Act on the ground that the case was of special importance having regard to the amount involved, namely about 7 lakhs of Rupees, though there was no specially-difficult question involved in the appeal and the vakil for the respondent was not even called upon to reply.

*Per Abdur Rahim, J.* :—The question whether interest on a mortgage debt ceases from the date of tender or deposit depends upon the provisions of the Transfer of Property Act. That Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that even if a valid tender has not been made interest will cease to run if the mortgagee happens to set up a right to the property in himself.

*Per Oldfield, J.*:—The foundation of S. 80 of the Transfer of Property Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender inasmuch as the person who has made the tender not merely has to produce money in order to make it, but must also keep it ready for payment in court or otherwise. There is a distinction to be drawn between a proposal to make a tender and an actual tender and there is no reason why a person who makes the former should be treated any better than a person who makes the latter.

*Venkatarayanim Garu* v. *Vatsavaya Venkata Subhadrayamma* (*Abdur Rahim and Oldfield, JJ*) ... ... ... 488

**Order**—Acquiscence in—Order returning plaint for presentation to proper court—Presentation of plaint as per order—Appeal against order returning plaint ... ... ... ... 397

**Partnership**—Death of one partner—Effect.—His legal representative—Position and status of—Release by one partner.—Binding nature on others—Binding nature on legal representative of deceased partner ... 41

———*Dissolution—Right to sue for—Hindu Law—Joint family—Managing member entering into partnership with stranger—Partition among members of family—Right of one or some of other members to sue for dissolution of the partnership—His or their remedy in such cases.*

**Partnership**—*Contd.* PAGE

A member of a joint Hindu family does not become *ipso facto* a partner by reason of a contract of partnership entered into by the managing member of his family with a stranger. In such a case the position of the other member or members of the family is no higher than that of a sub-partner. *Held*, therefore, that the other member and members could not, after becoming divided in status, sue for dissolution of the partnership.

Remedy of the other member or members in such cases discussed.

*Ganagayya* v *Venkataramiah.* (*The Chief Justice, Bakewell and Kumaraswami Sastri, JJ*) ... ... ... 271

———*Suit for recovery of money advanced by one partner against himself and another constituting a firm—Whether maintainable—Or.* 30, *R.* 9, *Civil Procedure Code—Scope of.*

The plaintiff and the defendant's father were the partners of a firm carrying on business at Soomangai and Kyato. The plaintiff had also a firm of his own at Rangoon. The plaintiff alleged that his Rangoon firm advanced sums of money on different occasions to the defendant's firm of which he himself was a partner, that the firm was dissolved long before the institution of the suit, and that on taking accounts a sum of Rs. 25,000 and odd was found due to the plaintiff's firm. Plaintiff sued for 1/4 of that sum on the basis that the defendant's share in the partnership was 1/4. The defendants contended that that would not be the sum due on taking of the entire account.

*Held* that the plaintiff was practically suing himself and his partner, and that the suit was not maintainable as he had not asked for accounts.

*Kashinatha Kedari* v. *Ganesh* (1902) I. L. R. 26 B. 739. *Chunder Sikhur Biswas* v. *Ram Buksh Chetlurge* (1878) 1 Cal. L. R. 545. followed.

O. 30, R. 9, Civil Procedure Code does not profess to lay down the circumstances under which the suits contemplated by that rule would be entertained, and it would not ordinarily be within the scope of the Civil Procedure Code to lay down any such proposition.

*Lakshmana Chetty* v. *Nagappa Chetty* (*Abdur Rahim and Oldfield, JJ.*) 408

**Plaint** — Order returning, for presentation to proper court — Presentation to proper court — Subsequent appeal against order returning plaint—Maintainability ... ... ... 739

**Possession** — Symbolical possession if and when amounts to actual possession. ... ... ... ... 97

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**Practice** — Appeal under O. 43, R. 1, C P. C. Converted into revision. 309

———*Plaint returned by the Munsiff to be presented to the proper court—Subsequent filing of the plaint in the Sub-Court—Appeal against the order of the Munsiff whether forfeited by filing the plaint in the Sub-Court—Valuation of suit—Suit to enforce right of pre-emption—Suits Valuation Act Ss.* 3 (*1*) *and* (6)—*Court Fees Act, S.* 7. (5) *and* (6)—*Madras Civil Courts* Act, *S* 14—*Suit to be valued under* S. 5. (5.)

Where the District Munsiff ordered the return of a plaint and the plaint was afterwards filed in the Subordinate Court and it was returned again and the plaintiff appealed against the Munsiffs' order of the return of the plaint, the plaintiff does not forfeit his right of appeal by electing to file his plaint in the Subordinate Court.

A suit to enforce a right of pre-emption of land is a suit the subject-matter of which is land within the meaning of S.14 of the Suits Valuation

**Practice**—*Contd.* PAGE

Act and should be valued for the purposes of jurisdiction in the manner provided for by the Court Fees Act, S. 7 (5).

*Narayan Nair* v. *Cheria Kalniri Kutty.* (*Oldfield and Sadasiva Aiyar, JJ.*) ... 397

———Pleadings—Amendment—Events subsequent to suit—Court if and when will take notice of ... ... ... 258

**Punjab Laws. Act (IV of 1872)**—S. 5—Custom—Plea of, as a rule of decision—Onus of proof ... ... ... 48

**Registration** *Act* (*XVI of* 1908), *S* 17 (1) (*b*) (2) (*xi*) —*Relinquishment of moneys due under a mortgage—Registration, necessity for Acknowledgment—Receipt for payment.*

An agreement in writing by a mortgagee whereby he relinquishes a sum of more than 100 Rs. out of the mortgage money, requires registration to make it admissible in evidence and it could not be relied on as an acknowledgment or receipt within the meaning of S. 17, sub-S. (2), Cl. (xi) of the Registration Act.

*Abdula Khan* v *Basharat Hussain* (1912) I. L. R. 35 A. 48 (P. C.). *Durga Prasad Singh* v. *Rajendra Narayan Bagh* (1913) I. L. R.. 41 C. 493 (P. C.) *Tika Ram* v. *The Dy. Commissioner of Bara Banki* (1899) I. L. R. 26 C. 707 (P. C.) *Gobardhan Sahai* v. *Adunath Rai* (1918) I. L. R. 35 A. 202, relied on ; *Shidlingappa* v. *Chenbasappa* (1879) I. L. R. 4 B. 285; *Kailash Chundra Nath* v. *Sheikh Cenu* (1914) I. L. R., 42 C. 546, distinguished.

*Lakshmana Setti* v. *Chenchuramayya* (*Abdur Rahim and Napier, JJ.*). 79

**Religious Endowment**—*Temple—Sale of goods on credit to manager—Liability of temple funds.*

In a suit to recover the price of fireworks sold on credit to the manager of a Hindu Temple, the plaintiff is not entitled to a decree against the temple funds as the purchase of fireworks is not necessary for the performance of the trusts.

*Palaniyappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* (1916) I. L. R. 40 M. 712 (P. C.), relied on.

*Adiraja Arsu alias Kumaraya Ballala* v. *Sheik Budan Sahib* (*Bakewell and Kumaraswami Sastri, JJ.*) ... ... ... 368

**Res judicata**—"*heard and finally decided*"—*proceedings in a former suit—decision not on the merits, effect of in subsequent proceedings—S.* 10, *British Baluchistan Regulation* 9 *of* 1896.

To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. An estoppel by judgment arises only when the "matter in issue" has been "finally decided."

S. 10 of the British Baluchistan Regulation 9 of 1896 is identical in effect with S. 11 of the Indian Civil Procedure Code.

When therefore, in a suit on a bond brought in British Baluchistan, the defence was that the bond had been obtained by fraud, and a previous suit by defendant for cancellation of the bond on that ground had been dismissed by two Courts on the merits, but in the third (the final Appellate Court) the dismissal had been upheld solely because the suit was not properly constituted.

*Held*, that the issue as to fraud had not been "heard and finally decided" within the meaning of, S. 10 of the Regulation, and that the defence based on that allegation was still open to defendant.

**Res judicata**—*Contd.* PAGE

*Sheosagar Sing* v. *Sitaram Sing*-(1897) L. R. 24 I. A. 50 ; I. L. R. 24 C. 616, followed.

*Abdullah Ashgar Ali Khan* v. *Ganesh Dass* (*Mr. Ameer Ali P. C.*) .... 12

———Hindu Law—Widow—Decision against—Effect on reversioners... 319

———Suit based on relationship of landlord and tenant—Dismissal for want of proof of tenancy—Subsequent suit based on title—Maintainability.... ... ... ... ... 167

**Revenue Sale**—*Bengal Land Revenue Sales Act*, 1859 (*Act* 11 *of* 1859); *Ss.* 31 *and* 53— *Encumbrances— Sale proceeds— Purchase by the proprietor—Sale brought about by the proprietor from dishonest motives—Code of Civil Procedure*, 1908 (*Act V of* 1908). *Ss.* 107 *and* 151 ; *O.* 41, *R.* 33—*Powers of the Court of Appeal—Estoppel.*

The Bengal Land Revenue Sales Act, 1859 (Act 11 of 1859), S. 31 provides that the purchase monys, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court ; but the section nowhere tranfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under S 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under S. 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the benamidar of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances; and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of this property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below, dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds :—

*Held*, that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumtances relating to the sale, the Court had abundant power under Sections 117 and 151, and Order 41, R 33, of the Code of Civil Procedure, 1908, to vary, as it did, the decree in the prior mortgagee's suit;

**Revenue Sale**—*Contd* PAGE

*Held*, also, that the fact that the puisne mortgaee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief.

*Tarini Charan Sarkar* v. *Bishun Chand.* (*Lord Buckmaster*) P. C. ... 361

**Riparian land**—What is—Riparian owner—Right to store water lifted from natural stream in wells temporarily before carrying it on to irrigated land—Easement Act, S. 7 cl. (*b*) ill. (*j*)—Effect—Water cess—Levy of—Legality—Use by inamdar or Zemindar of water of natural stream to irrigate riparian lands—Liability for water cess—Ownership of bed of stream—Effect.

*Per Sadasiva Iyer, J.*—In India, riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a reasonable depth inland. A depth of more than half a furlong would, usually, be unreasonable.

Whether the bed of the stream whose water is used by an inamdar or a Zemindar to irrigate his riparian lands bordering on a natural stream belongs wholly to Government or partly to Government and partly to Inamdar or Zemindar or wholly to the Inamdar or Zemindar, the Government has no right to levy separate water cess for the use of such water.

*Janakiramayya* v. *Secretary of State for India.* (1915) 29 M. L. J 389 at 427.

A riparian owner in India has a natural right not merely to lift water from a natural stream and carry the lifted water at once to the land direct but the right to store such lifted water in wells temporarily before carrying it on to the irrigated lands. *Lakshminarasu Avadhanulu* v. *Secretary of State for India.* (*Sadasiva Iyer and Phillips, JJ.*) 223

**Small Cause Court** — Jurisdiction — Suit to recover Thunduwaram—Maintainability. ... ... ... ... 104

**Specific Performance of Contract of mortgage**—Suit for—Suit for recovery of portion of consideration for mortgage—Maintainability. 342

**Specific Relief Act, S. 42**—H. Law—Widow—Alienation likely to prejudice reversioner's rights—Declaratory suit by reversioner—Maintainability. ... ... ... ... 67

**Suits Valuation Act—Ss. 3 (1) and 6**—Pre-emption—Suit to enforce right of ... ... ... ... 397

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———**S. 43**—Applicability—village service inam—Enfranchisement—Mortgage after grant of title deed but before notification—Validity—Subsequent notification—Effect ... ... ... 17

———**S. 52**—lis Pendens—Rule of—Applicability to alienations made by parties ranged on same side and between whom there is no conflict. 269

———**S. 72**—*Right of mortgagee to recover expenses incurred in protecting mortgagor's title by separate suit—Minor—Step-mother, if entitled to act as guardian—Liability of minor on a bond executed by guardian for proper purpose.*

A mortgagee in possession instituted criminal proceedings against his tenants who cut off and carried away the crops on the land asserting the title of a stranger as owner. The mortgagor died leaving an only minor son and the step-mother of the minor acting as his guardian executed a bond

in favour of the mortgagee undertaking to pay the expenses of the Criminal Prosecution. It was found that the expenses incurred in the criminal prosecution were necessary and that the mortgagee acted as a prudent owner in incurring them. In a separate suit on the bond against the minor son of the mortgagor, it was contended on his behalf that the suit was not maintainable by reason of S. 72 of the Transfer of Property Act, that the step mother was not a guardian of the minor and had no power to bind him and that no decree could be given against the minor personally or against his estate.

*Held* (1) that S. 72 of the Transfer of Property Act was no bar to the suit as the terms of that section were merely permissive and did not make it obligatory on the mortgagee to add the expenses incurred by him to the mortgage money and to insist on being paid those sums before redemption, *Bavamma* v. *Balagurivi* (1898) 9 M. L. J. 177 diss. from; (2) that the step-mother of the minor was competent to act as his guardian in the absence of nearer relations; and (3) that though the minor could not be charged with personal liability, his estate was liable for the debt due under the bond.

*Indur Chunder Singh* v. *Radha Kishore-Ghose* (1892) I L. R. 19 C 507 distinguished. *Subramania Aiyar* v. *Arumuga Chetty* (1902) I. L. R. 26 M 330, *Dorasami Reddi* v. *Muthial Reddi* (1908) I. L. R. 31 M. 458 *Krishna Chettiar* v. *Nagamani Ammal* (1915) I. L R. 39 M. 195, 917 relied on.

*Venkitaswami Naicker* v. *Muthusami Pillai* (*Seshagiri Aiyar and Napier JJ.*) ... ... ... ... 177

———S. 83—*Deposit—Tender of more amount than is actually due on the mortgage, validity of—Deposit with conditions not covered by the section—Objection to deposit, waiver of—Right to interest.*

In the year 1902 the defendant obtained a usufructuary mortgage of several items of property. In 1908 the plaintiff purchased in court auction a portion of the property subject however to the defendant's mortgage. On the 9th January 1912 plaintiff deposited in court the full amount due on the mortgage and presented a petition requesting the court to pass an order "directing the counter—petitioner (defendant) to hand over all the mortgaged properties with the produce to the petitioner (plaintiff) on receiving the mortgage money or directing the counter—petitioner (defendant) to hand over the lands purchased by the plaintiff in auction on receiving a proportionate amount, making the counter—petitioner liable for costs and granting other reliefs." The court gave notice of the deposit under S. 83 of the Transfer of Property Act, but the mortgagee took no objection that the mortgagor had not deposited the amount remaining due on the mortgage as required by the section but merely declined to to accept the amount deposited on the ground that there was only an offer pay a proportionate amount without specifying what that amount actually was. The mortgagee also expressed his willingness to hand over such of the properties as had been purchased by the plaintiff on receiving the whole of the mortgage money. As the parties were not able to come to terms the court passed the following order on plaintiff's petition "Counter petitioner (defendant) refuses to receive money. Petitioner (plaintiff) is referred to a regular suit. This petition is dismissed." In 1913 plaintiff

**Tr. of P. Act**—*Contd.* PAGE

brought a suit for redemption of the properties purchased by him and it was found that the deposit had remained in court all along since 1912 and that the amount stated in the plaint as due to the defendant in respect of the suit properties was correct. *Held*, that there was a good deposit of the mortgage money and the plaintiff was entitled to interest on the amount of deposit after the date of service of the plaint and the summons on the defendant.

*Per Seshagiri Aiyar, J*:—A tender of a sum larger than the amount remaining due on a mortgage is a valid tender under S. 83 of the Transfer of Property Act.

Cases on the subject discussed.

*Subramania Aiyar* v. *Narayanaswami Vandayar* (*Seshagiri Aiyar and Napier, JJ.*) ... ... ... ... 439

——S. 111 (9)—Principle of—Applicability to agricultual leases ... 170

**Unsettled** palayam — *Service tenure—Alienability and liability for debts—Abolition of Military and Police services—Omission to issue sanad under Regulation 25 of 1802—Restraint on alienation cessation of—Enfranchisement from service, if validates prior alientions—Spes successionis—Mortgage and sale of, not operative on mortgagor's interest when it falls into possession—Execution sale supportable on foot of personal liability clause in decree—Possession, if adverse to the estate so as to bar successors—Limitation Act Arts.* 120, 142 *and* 144.

In India, apart from statute, lands held on service tenure are inalienable beyond the life-time of the holder. Where however, an estate is freed from its connection with a public office and the services are abolished, it is subject to the same incidents of ownership and devolution as ordinary property. *Papaya* v. *Ramana* (1883) I. L. R 7 M. 85. *Pakkiam Pillay* v. *Seetharama Vadhyar* (1903) 14 M. L. J. 131. *Radhabai and Ramachandra Kynher* v. *Anantrao Bagavant Deshpandhe* (1885) I. L. R. 9 B. 198. Referred to.

Where lands held on service tenure have been alienated, the subsequent enfranchisement of the lands from service will not validate the lienation so as to give an absolute interest to the alienee. *Sannamma* v. *Radhabayi* (1917) 34 M L. J. 17. *Padapa* v. *Swamirao* (1900) I. L. R. 24 B. 556. Relied on.

An unsettled palayam held originally on condition of rendering military and police services, ceases to be inalienable on the abolition of such services by the British Government, notwithstanding the omission of the Government to issue a sanad under Regulation 25 of 1802 finally settling the peishcush payable by the holder of the estate. *Collector of Trichinopoly* v. *Lekkamani* (1874) L. R. 1. I. A. 283. *Oolagappa Chetty* v. *Arbuthnot* L. R. 1. I. A. 268. Relied on.

Where a person having merely a *spes successionis* in respect of a particular property purports to transfer it such transfer does not operate on the interest of the transferor if and when he actually succeeds to the property. *Ramasami Naick* v. *Ramasami Chetty* (1906) I. L. R. 30 M. 255, 262, followed.

*Obiter*: Assuming that the estate of a poligar is one for life, the poligar for the time being would ordinarly represent the estate. If, therefore, the poligar for the time being is dispossessed and he fails to sue for possession within 12 years of the dispossession, the person in possession gets an absolute title to the estate and the successor of the poligar has not got a fresh starting point from the date of his succession unless he

**Tr. cf P Act**—*Contd.* PAGE

shows that his predecessor had effectually debarred himself from suing and there was no one else who could have sued sucessfully for possession. *Murray* v *East India Company*, 5 B and A. 204. *Musuras Bey* v. *Gadban* (1894, 2 Q. B 359. *Meyyappa Chetty* v. *Subramanian Chetty* (1916) L R. 43, I. A 113, 120 Referred to.

*The Midnapore Zemindari Company Limited* v. *Malayandi Appayasami Naicker*, (*Chief Justice and Justice Spencer.*) ... 563

**Wagering contracts**—*Common intention to wager essential—Speculation not equivalent to wagering—Indian Contract Act (Act I of* 1872). *S.* 30—*Bombay Act III of* 1865, *Ss.* 1, 2—*Pakka Adatias—Their Position.*

Speculation does not necessarily involve a contract by way of wager : to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for.

*Bhagawandas Parasram* v. *Burjorji Ruttonji Bomanji.* (*Sir Lawrence Jenkins,*) P. C. ... ... ... 335

**Will**—*Construction—Bequest by implication—The same rules apply in this country as in England—Bequest to the two daughters of testator in shares—Further provision that the male Santhathi (offspring) of one of the daughters should take like the offspring of other daughter—No express gift to the latter take a bequest by implication.*

A testator died leaving behind him two daughters, the elder named Seshamma, who had no offspring at the testator's death and the younger named Andalammal who had offspring and by the terms of his will provided as follows " as out of my above said two daughters Andalammal has been attending to all my comforts and as her male *santhathi* are entitled to perform Karmams to me she should enjoy two thirds—two of the three shares—and Seshamma should enjoy the third share." The testator further provided that " my daughters should enjoy the said land in the proportion of the above three shares" and further provided 'if a male issue is hereafter born to my daughter, that is, Seshamma, that grandson *should like the santhathi of my younger daughter* enjoy her third share having power of gift and sale from son to grandson and so on from generation to generation" and there were no words of express bequest to Andalammal's children.

*Held* on a construction of will, the offspring of Andalammal, though there is no express bequest of properties to them, took an estate by implication.

The rules as to bequests by implication are the same in this country as in England.

*Towns* v *Wentworth* (1858) 11 Moo. P. C. p.526. *Sweeting* v. *Prideaun* (1876, 2 Ch D p. 413. *Key* v. *Key* (1853) 4 De. M. & G. p. 84. *In re Redfern*: *Redfern* v. *Bryning* (1877) 6 Ch. D. p. 133. *Ellocasee Dasee* v. *Durpunarain* (1878) I. L. R. 5 Cal. 59 at p. 63. *Chedilal* v. *Gobind Ram* (1902) I. L. R. 30 All. p. 458. *Seshamma* v. *Narasamma* (1899) I. L. R. 22 Mad. 35, followed. ... ...

*Srinivasa Seshacharlu* v. *Seshamma* (*Abdur Rahim and Oldfield JJ.*)... 479

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